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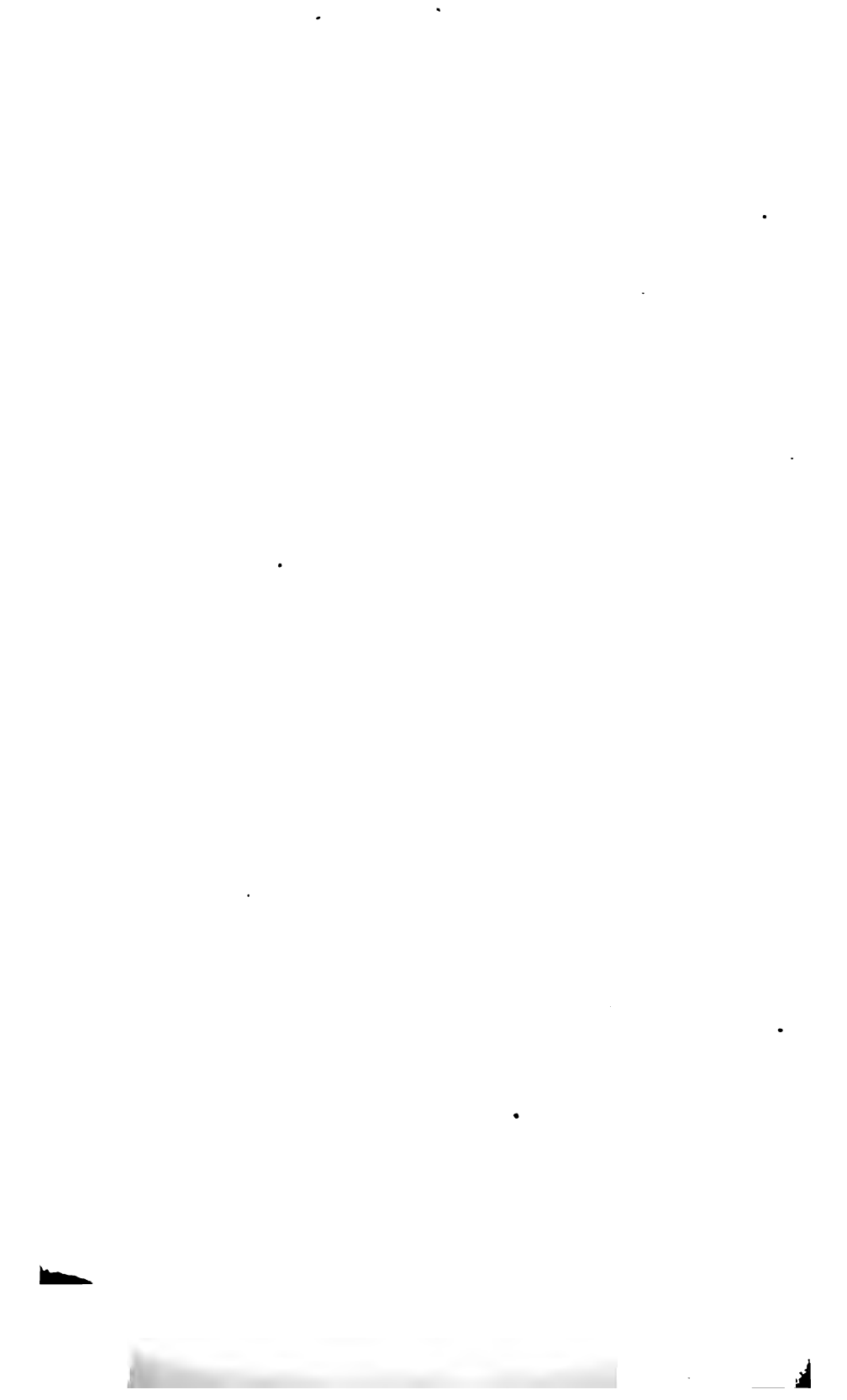
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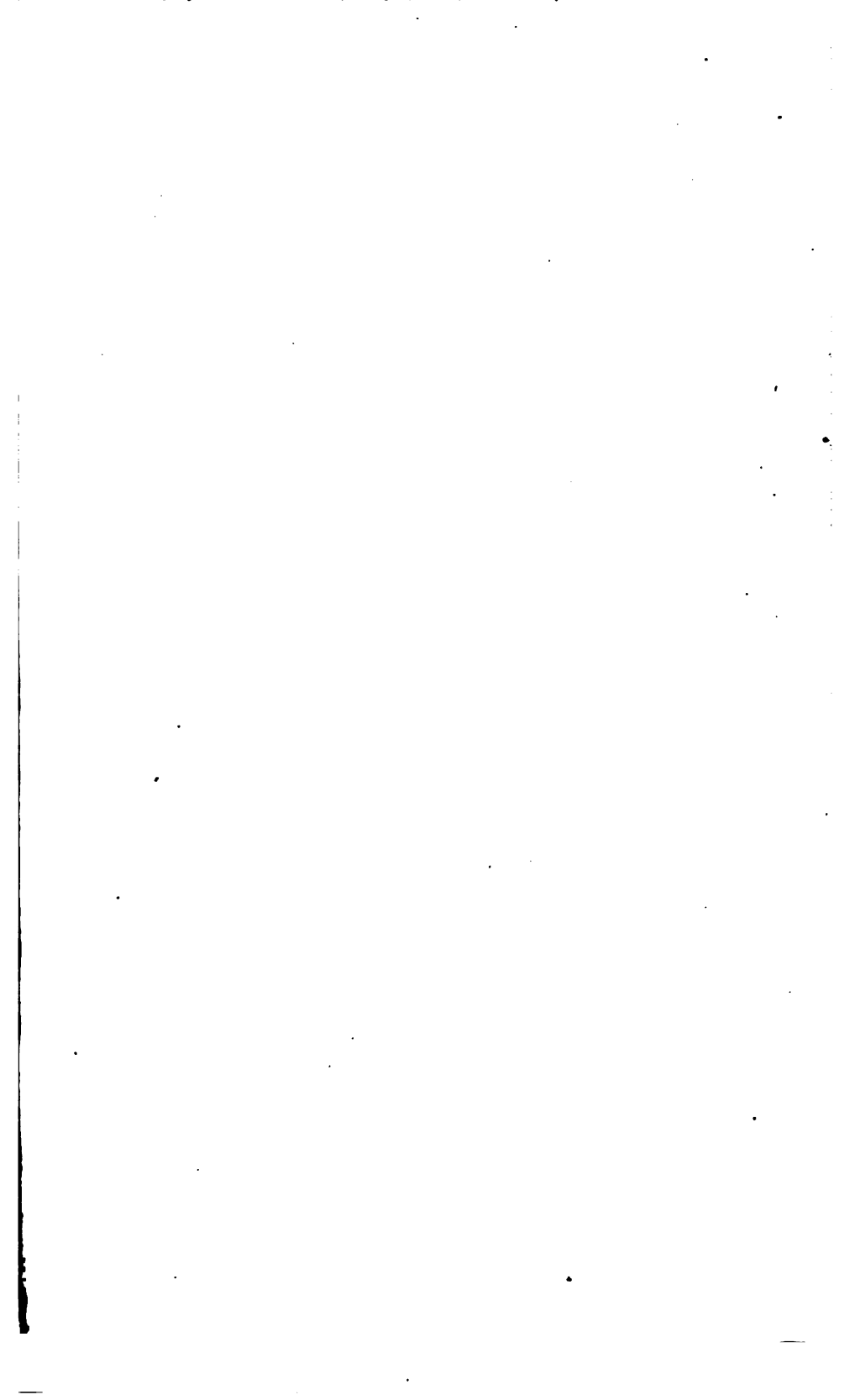
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S. J. FIELD.









REPORTS'
OF
C A S E S
ARGUED AND DETERMINED
IN THE
Supreme Court of Judicature,
AND IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
AND
THE CORRECTION OF ERRORS,
IN THE
STATE OF NEW-YORK.

BY WILLIAM JOHNSON,
COUNSELLOR AT LAW.

VOL. XVIII.

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JUDGES

OF

THE SUPREME COURT OF JUDICATURE

OF

THE STATE OF NEW-YORK,

DURING THE TIME OF

THE EIGHTEENTH VOLUME OF THESE REPORTS

AMBROSE SPENCER, Esq., *Chief Justice.*

WILLIAM W. VAN NESS, Esq.

JOSEPH C. YATES, Esq.

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JOHN WOODWORTH, Esq.

Attorney General.

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SOUTHERN DISTRICT OF NEW-YORK, ss.

BE IT REMEMBERED, That on the twenty-seventh day of June, in the forty-fifth year of the Independence of the United States of America, WILLIAM JOHNSON, of the said district, hath deposited in this office the title of a book, the right whereof he claims as author, in the words and figures following, to wit:

"Reports of Cases argued and determined in the Supreme Court of Judicature, and in the Court for the Trial of Impeachments and the Correction of Errors, in the State of New-York. By William Johnson, Counsellor at Law. Vol. XVIII."

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G. L. THOMPSON,
Clerk of the Southern District of New-York

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE,

STATE OF NEW-YORK,

IN MAY TERM, 1820, IN THE FORTY-FOURTH YEAR OF OUR
INDEPENDENCE.

TRAPPAN *against* MORIE.

BY virtue of a *fiery facias*, issued on a judgment in favor of the plaintiff against the defendant, who was tenant of a house owned by *T. Parcells*, and which he had leased to one *William Dean*, under whom the defendant took possession, the sheriff of *New-York*, on the 12th of *July*, 1819, levied on the goods and chattels of the defendant on the premises. The landlord, *Parcells*, on the 14th of *July*, 1819, made an affidavit, that *Dean* was justly indebted to him in the sum of 350 dollars, for rent of the premises, due on the 1st of *May*, 1819, which he filed in the clerk's office, and served a copy thereof on the sheriff, giving him notice, at the same time, that he claimed to be paid the rent so due, before the goods were removed from the premises. The goods not being removed or sold, and another quarter's rent on the premises having become due to him, *P.*, on the 26th of *August*, 1819, made affidavit, and gave notice to the sheriff, in like manner, that the sum of six hundred and fifty dollars was due to him, for rent of the premises, which he claimed to have paid to him before the goods were removed *or sold. On the 14th of *September*, 1819, the sheriff sold the goods on the execution for 404 dollars and 65 cents.

A landlord, where the goods of the tenant are taken in execution, can only claim of the sheriff the rent due at the time of taking the goods; not rent which accrues after the levy of the execution, and while the goods remain on the premises, in the possession of the sheriff.

[* 2]

Drake, in behalf of the landlord, now moved for an order on the sheriff to pay over the money remaining in his hands from the proceeds of the execution to *P.*, the landlord.

Burr, contra, read an affidavit, stating that the defendant

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May, 1820.
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ALEXANDER.

entered into possession of the premises on the 1st of *May*, 1819, that, afterwards, *P.*, the landlord, had said that he should not exact from the defendant any rent due for the premises previous to her taking possession; and that, in consequence thereof, the plaintiff had been induced to credit the defendant to a considerable amount.

He contended, that the landlord could not, in any event, be entitled to demand of the sheriff any rent which became due subsequently to the levy of the execution, though the goods were afterwards removed and sold. (*Gwillam v. Barker*, 1 *Price's Ex. Rep.* 274. *Hoskins v. Knight*, 1 *Maule & Selw. Rep.* 245.)

Per Curiam. The landlord had a *lien* on the goods for the quarter's rent due on the 1st of *May*, 1819, previous to the levy of the execution. But he is not entitled to demand of the sheriff the rent which subsequently accrued, while the goods remained on the premises, in the sheriff's possession. The rule, therefore, must be for the sheriff to pay to *Parcells*, the landlord, the rent due on the 1st of *May*, 1819.

Rule accordingly. (a)

(a) *Hazard v. Raymond*, 2 *Johns. Rep.* 478. *Alexander v. Mahon*, 11 *Johns Rep.* 185. *Russel v. Doty*, 4 *Cowen's Rep.* 576.

[*3] *SULLIVAN, assignee, &c., against ALEXANDER AND OTHERS.

Where the attorney for the plaintiff delivered a *capias ad resp.* to a person, with directions to deliver it to the sheriff, in case *A.*, one of the defendants, a prisoner in execution, who had been admitted to the liberties of the gaol, on bail, should be found beyond the limits of the gaol liberties, and to alter the *teste* and *return* of the writ, in case it should not be necessary to deliver it before the return day expired; and the agent of the attorney accordingly altered the *teste* and *return* of the writ, and then delivered it to the sheriff,—the court refused to set aside the writ.

The attorney, or any person by him authorized for that purpose, may alter the *teste* and *return* of a writ before it is used or served.

accordingly, kept the writ until it became necessary to use it, when he altered it, by making the teste at *Albany* on the second day of *August*, 1819, and returnable at the same place on the third day of *August*, 1819.

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The plaintiff did not declare until the 15th day of *February* last.

The defendants' attorney, in his affidavit, stated that he did not apply at the last term to set aside the writ, because, from the length of time that had elapsed without the plaintiff's declaring, he doubted whether the plaintiff meant to proceed on the writ; and because he supposed that, in case of such application, it would be requisite for the court to inspect the writ which was filed in the office of the clerk in *New-York*. That the cause of action was stated in the declaration to have accrued on the third of *August*, 1819.

Wells. In *Sloan v. Wattles*, (13 *Johns. Rep.* 158.) the attorney had sent the writ to the sheriff, with instructions to him, that in case he did not receive it in time, to alter the return day, which he did, and the court refused to set aside *the writ, saying that the attorney, or a person fully authorized by him, might so alter a writ before it was actually served. In the present case, not only the return day, but the teste has been altered, so that it is an entirely new writ. May an attorney keep a writ in his pocket, until it is spent, or the return day is entirely past, and then alter the teste and return, so as to avoid paying for a new seal? In *England*, it has been held to be illegal to fill up or alter a writ after it has been sealed, and it is punishable as a misdemeanor. (8 *Mod.* 243. 6 *Mod.* 310. *Dyer*, 241. b. 22 *Vin. Abr.* 547.) (a)

[* 4]

D B. Ogden, contra. The only question is, whether the writ had been used or served; for the court, in *Sloan v. Wattles*, expressly decided, that the attorney, or the sheriff, as his authorized agent, might make the alteration before the writ has been actually served. Now, the affidavits are positive, that the alteration was made before the writ was used.

T. A. Emmet, in reply. This practice of allowing writs to be altered after they are sealed, would, certainly, not be tolerated by the *English* courts. For the convenience of attorneys residing in distant parts of the state, this court have found it necessary to allow the clerks to deliver sealed blank writs.—But the attorney is bound to use these blanks *bona fide*. After a writ has been once filled up and used, it cannot be altered for the purpose of being used a second time. The power is,

(a) A seal of the court, that has been once used by being affixed to blank process which has been filled up, though not issued, or delivered to the sheriff, cannot be again used, by being detached, and affixed to another writ; and if so used, the writ will be set aside. (*Filkins v. Brockway*, 19 *Johns. Rep.* 170.)

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HUNT
v.
BROOKS

certainly, liable to great abuse. Here is a person employed by the creditor to watch the motions of a prisoner admitted to the liberties of the *gaol*, and when he has stepped beyond the limits, to alter the writ, and immediately deliver it to the coroner or sheriff, when neither the attorney, nor the plaintiff, at the time, know that any cause of action exists.

[* 5]

Per Curiam. The motion must be denied. The court have, not only in *Sloan v. Wattles*, but in several other cases, allowed the attorney, or a person specially authorized *by him for that purpose, to alter the *teste and return* of a writ before it was served.

Motion denied.

HUNT against BROOKS.

Where a defendant had been discharged under the act of 1801, for the relief of debtors with respect to the imprisonment of their persons, and afterwards under the act for the benefit of insolvent debtors and their creditors, passed 3d of April, 1811, and the plaintiff, notwithstanding the discharge under the last mentioned act, issued a *fi. fa.* on the judgment under the provisions of the first act; the court refused to set aside the execution, leaving the defendant to his *audita querela*, but not allowing it to operate as a *supersedeas* to the

[* 6]
execution; or to stay the proceedings on the execution pending the *audita querela*.

THE plaintiff recovered a judgment against the defendant, in August, 1804, on which a *test. fi. fa.* was issued, and returned in part satisfied. A *test. cap. ad sat.* was thereupon issued, on which the defendant was imprisoned from 1805 to June, 1808, when, on application to the Court of Common Pleas, he was discharged from imprisonment, pursuant to "the act for the relief of debtors with respect to the imprisonment of their persons." (1 *N. R. L.* 348. sess. 36. ch. 81. 2 *Rev. Stat.* 16.) And on the 7th of February, 1812, the defendant was discharged from his debts, by virtue of the "act for the benefit of insolvent debtors and creditors," passed April 3d, 1811. On the 1st of March, 1819, the plaintiff caused an *alias test. fi. fa.* to be issued and delivered to the sheriff of Madison county, by which the sheriff levied on the personal property of the defendant to the value of fifty dollars; and the sheriff also levied on the real estate of the defendant. After the return of the *alias test. fi. fa.* a *venditioni exponas* was issued and delivered to the sheriff. In May, 1819, application was made to the court to set aside the *alias test. fi. fa.* on the ground of the discharges of the defendant under the acts above-mentioned, but the court, in August following, denied the motion, (a) and allowed the plaintiff to amend his execution. In October term last, the defendant made a second application to the court to set aside the execution, and for leave to issue an *audita querela*. The court granted leave to issue an **audita querela*, but not to operate as a *supersedeas* to the execution. The defendant brought a writ of error on the decision of the court, denying his application to set aside the execution. This writ of error

(a) On the ground and for the reasons stated in *Roosevelt v. Cebra*, (17 *Johas. Rep.* 108.)

was, in *March* last, quashed in the Court for the Correction of Errors, but without expressing any opinion on the merits of the case, on the ground that no writ of error would lie on such an *order* of this court; and that the proper remedy was by *audita querela*. (a) The defendant accordingly sued out a writ of *audita querela*, which was presented to this court and allowed, and a *venire facias* was issued thereon.

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S. Jones, jun., for the defendant, on the ground of these proceedings, now moved for a *supersedeas* to the *venditioni exponas*, directed to the sheriff of *Madison* county, or for such other relief as this court should think proper to grant. The affidavit of the defendant stated, that he was informed and believed, that the plaintiff was in embarrassed circumstances, and that he would be unable to refund to the defendant the amount of real and personal property which had been levied on under the execution, in case a sale thereof should be made. But this allegation was denied by the plaintiff's affidavit.

Jones said it was the usual course, on allowing and filing the *audita querela*, for the court to supersede the execution, or, at least, to order a stay of all proceedings thereon pending the action of *audita querela*. (2 *Crompt. Pr.* 426.) If the property should be sold under the execution, and the money paid over to the plaintiff, the defendant would be without remedy.

T. A. Emmet, contra.

Per Curiam. The court, in *October* term, when they allowed the defendant his *audita querela*, decided that it should not operate as a *supersedeas* to the execution. We did not mean to set aside or stay the execution. This is a renewal *of the same application. The motion must be denied.

[* 7]

Motion denied.

(a) Vide *S. C. in Error*, vol. 17.

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JACKSON, *ex dem.* RANDALL and another, *against*
T. & A. DAVIS.

In an action of ejectment, the plaintiff claimed title under a sheriff's sale on an execution, and the exemplification of the record of the judgment stated, that it was filed and docketed on the 22d of May; and the execution directed the sheriff to levy on the lands of which the defendant was seised on the 2d of May: *Held*, that this was not such an irregularity as would affect or destroy the title of the

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purchaser under the sheriff's sale. And, the clerk of the court having certified that there was an error in the exemplification, and that the record was, in fact, filed on the 2d of May, the court refused to grant a new trial on the ground of the mistake.

A deputy sheriff may sell lands under an execution, and execute a deed to the purchaser as in the name of the sheriff; it is not necessary to show any special authority from the sheriff to the deputy.

A purchaser, under a sheriff's sale, of all the right and title to land of a mortgagor in possession, is entitled to recover in ejectment against the mortgagor, though the mortgagee has been made a co-defendant and the mortgage is outstanding.

Where the lessor, in an action of ejectment, who had become the purchaser of land under an execution and judgment in his favor, had covenanted with the defendant to postpone the sale for two years, it is no defence in the action that the sale was made in violation of his covenant, and before the expiration of the time limited.

Though the existence of an *absolute* deed may be proved by a *recital* in another deed against the party making such recital; yet it seems, that an outstanding mortgage cannot be proved by such recital; for if produced, it might appear to have been satisfied, no release being necessary to re-convey the title to the mortgagor.

THIS was an action of ejectment for part of lot No. 55, in the town of *Manlius*, tried at the *Onondaga* circuit, in *June*, 1819, before Mr. Justice *Platt*. The plaintiff claimed title to the premises under a sheriff's sale on a *fi. fa.* issued on a judgment in this court, in favor of *Randall*, one of the lessors, against *Thomas Davis*, one of the defendants, for 600 dollars of debt, &c., the record of which, according to the exemplification thereof, produced at the trial, was signed *May* 2d, 1816, and filed and docketed the 22d of *May*, 1816. The *fi. fa.* directed the sheriff to levy on the lands of which the said *T. D.* was seised on the 2d of *May*, 1816, or at any time thereafter, &c. The plaintiff also gave in evidence the record of another judgment in the *Onondago* Court of Common Pleas, in favor of *Sylvanus Tousley*, the other lessor, against *T. D.*, signed the 25th day of *September*, 1816, and filed and docketed the same day; and the *fi. fa.* on this judgment directed the sheriff to levy on lands of which *T. D.* was seised, the 20th day of *September*, 1816, or at any time thereafter, &c. The *suit was commenced against *T. D.* alone, the tenant in possession, and *A. D.*, the other defendant, was afterwards let in to defend as landlord.

The defendants' counsel objected to these executions being admitted in evidence, because they directed the sheriff to levy the debts, &c. on lands and tenements of which the defendant, *T. D.*, was seised, prior to the time of filing and docketing the judgments. The judge admitted the evidence, reserving the point. The plaintiff then proved a sale to the lessors, who were the plaintiffs named in the executions, on the 13th of *August*, 1818, and gave in evidence a deed executed by *John Grinnol*, a deputy sheriff, signed as follows: "*John Grinnol* for *Jonas Earl, jun.* (L. S.*)" and acknowledged by *Grinnol*. The defendant's counsel objected to the deed as evidence, on the ground that it did not appear that *Grinnol* had any special authority to execute it; but the judge overruled the objection.

It was admitted that the defendants were in possession; and they offered in evidence the registry of a mortgage executed

by *T. D.* to *A. D.*, dated the 26th of *July*, 1809, for the premises in question; the plaintiff's counsel objected to the evidence, and it was overruled by the judge. The defendant's counsel then gave in evidence a covenant, executed the 9th of *June*, 1817, by which the lessors of the plaintiff, in consideration that *A. D.* had that day covenanted and agreed to give the judgments above-mentioned a preference over his mortgage, covenanted and agreed to postpone and delay the sale of the premises, by virtue of the judgments and executions, for two years from the date of that agreement, on condition that the interest on the balance due on the judgments be paid by the 9th of *June* then next.

The jury, by direction of the judge, found a verdict for the plaintiff, subject to the opinion of the court on the above case.

On the argument, the plaintiff produced the certificate of *A. Breese*, one of the clerks of this court, that the judgment first above-mentioned was, in fact, filed and docketed the 2d of *May* 1816, there having been a mistake in the exemption.

**Sill*, for the plaintiff, contended, that the act (36 sess. ch. 50. sec. 2. 1 *N. R. L.* 501. 2 *Rev. Stat.* 360. § 1.) which declares, that no judgments shall affect lands, as to purchasers or mortgagees, &c. did not apply to the defendants, who were not purchasers or mortgagees; that the actual time of filing the record, therefore, was not material, in this case, as no land had, in fact, been levied on, but what was liable to the judgment. The direction to the sheriff in the body of the execution, did not render it void. It was a clerical mistake, which might be amended, and ought not to prejudice the plaintiff. (13 *Johns. Rep.* 101. 8 *Johns. Rep.* 361. 2 *Johns. Rep.* 46.)

Again; as to the objection that the deed was executed by the deputy sheriff, this court, in *Jackson, ex dem. Marten, v. Bush*, (10 *Johns. Rep.* 223.) decided, that a deed executed by the deputy sheriff, in the name and behalf of his principal, was good. (2 *Johns. Rep.* 63.) The deputy is vested with the same power, in this respect, as the sheriff himself.

The registry of a mortgage is merely to secure the priority of the encumbrance, and is no evidence of title. And the covenant or contract which was introduced is no evidence, for it refers to a mortgage which is higher and better evidence. Besides, it does not appear that the condition was ever performed.

N. Williams, contra. The lessors of the plaintiff, having purchased under the execution, are to be deemed to have notice of all irregularities in the process or proceedings. (*Simonds v. Catlin*, 2 *Caines's Rep.* 61.) A *fi. fa.* issuing into a

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different county from that in which the venue was laid, without a *testatum*, is void ; so is a *fi. fa.* tested out of term. The statute directs, that the particular day on which the lands became liable for the debt, by reason of the judgment, should be specified in the execution. (1 *N. R. L.* 502. s. 9. 2 *Rev. Stat.* 367. s. 24.) There is here a defect in authority. All the power to take lands in execution, is derived from the statute. (s. 7.)

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The registry of the mortgage ought to have been received as evidence ; but if not admissible, the *recital* of the *mortgage in the contract executed by the parties, was sufficient, as the lessors were estopped by the recital from denying the mortgage. (*Gilb. Ev.* 87. *Phillips's Ev.* 356.)

By this contract, the lessors of the plaintiff agreed to postpone the sale of the premises, until after the time when they were, in fact, sold

PLATT, J., delivered the opinion of the court. The plaintiff claims title under the sheriff's sale on a *fi. fa.* upon a judgment in this court, in favor of *Randall v. Thomas Davis*, which, according to the exemplification by the clerk, was signed on the 2d of May, and filed and docketed on the 22d of May, 1816.

The *fi. fa.* directed the sheriff to sell the lands whereof *Thomas Davis* (one of these defendants) was seised on the 2d of May, 1816, &c.

There was also another judgment in the Common Pleas of *Onondaga*, in favor of *Tousley*, against the same defendant, and a *fi. fa.* thereon, in which a similar mistake appeared in making the *fi. fa.* overreach the filing and docketing of the judgment.

This suit was originally against *Thomas Davis* alone, as tenant in possession, and *Anthony Davis* was admitted as co-defendant, claiming to be landlord, &c.

The first question on the trial was, whether the mistake in the executions was fatal. I reserved that point ; and in regard to the first judgment, the clerk now certifies that he made a mistake in the exemplification, as to the time of filing the record of judgment ; that it was on the 2d, and not the 22d, of May, 1816. So that even admitting the objection at the trial to have been well founded, yet it is now obviated, and it would be useless to send the cause to a new trial for that error.

I incline to think, however, that such an irregularity in the *fi. fa.* would not invalidate the title derived under the sheriff's sale. I do not perceive that it could injure any person.

The 2d objection at the trial was, that the deed was executed to the lessors of the plaintiff by a *deputy sheriff*, without showing any special authority to do that particular act. This objection was overruled ; and I see no reason to doubt *th.

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propriety of that decision. He was admitted to be, *in fact*, a general deputy; and that is enough to authorize his executing the deed for the sheriff, as well as any other act which might be done by deputy.

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The defendants admitted the actual possession of *Thomas Davis*, one of the defendants; but contended that he had executed a mortgage of the premises to *Anthony Davis*, prior to the judgments under which the plaintiff claimed, and offered the registry of mortgages to prove such mortgage, which was rejected as incompetent evidence.

The defendants then gave in evidence a covenant whereby the lessors of the plaintiff recite that *Thomas Davis* had executed such a mortgage to *Anthony Davis*; and in which covenant they stipulate, that in consideration that *Anthony Davis* had agreed to allow the judgments to take priority over his mortgage, they (the lessors of the plaintiff) would stay executions for two years, from the 9th of *June*, 1817; provided the interest on the amount of the judgments should be paid yearly. One year's interest, according to this covenant, fell due on the 9th of *June*, 1818; and the premises were sold on the executions, on the 13th of *August*, 1818. No evidence of payment of interest was offered; nor was there any evidence that the mortgagee had ever come to the actual possession under his mortgage.

The covenant to stay execution is not available in ejectment. If that stipulation was violated, the defendants should have applied to the court to set aside the execution; or might have had relief in chancery. But here is no evidence that the covenant was broken on the part of the lessors of the plaintiff. The presumption is, that the interest was not paid; and, therefore, they had a right to issue execution, &c.

The utmost effect of the covenant, in this action, was to prove, by the recital, the existence of such a mortgage. But, even then, the equity of redemption might be sold, and was actually conveyed to the lessors of the plaintiff under those executions; and they are entitled to the possession which the mortgagor holds.

Besides, although the existence of an *absolute deed* or *lease* may be proved by a recital, against the party making such recital, and all claiming under him, yet I incline to think that a *mortgage* cannot be so proved, because it is defeasible by payment of the mortgage money; and if produced, it might probably show an acknowledgment of satisfaction on the back of it, that being the usual mode; no release being necessary to restore the title to the mortgagor.

But whether there be such an outstanding mortgage or not, the plaintiff is entitled to recover the possession, as against the mortgagor, whose title, more or less, has been sold to the lessors of the plaintiff on a *fi. fa.* against such mortgagor in possession; and the mortgagee having been made co-defendant,

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makes no difference, unless it be shown that there was an actual transfer of possession from the mortgagor to the mortgagee, which is not pretended in this case.

We are, therefore, of opinion, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.

OLMSTEAD against GREENLY.

The plaintiff was endorser of a note made by B. for his accommodation: and B., who was also indebted to the plaintiff, having a sum of money and goods, with which he was ready to pay

[* 13] the note &c. and to secure the plaintiff; it was agreed between the plaintiff, B., and the defendant, that B. should place the money and goods in the hands of the defendant, who should pay the note, and the debt due the plaintiff, and indemnify the plaintiff against the note, &c.; and B. accordingly delivered the money and goods to the defendant, who thereupon undertook to pay the note, &c. Held, that this was not a promise or undertaking for the debt or default of another, within the statute of frauds; and the defendant having failed to perform his agreement, the plaintiff is entitled to recover damages for the breach of the contract.

THIS was an action of assumpsit. The declaration contained three special counts, and a count for money paid, &c., money had and received, &c. The three first counts, though there was some slight variation between them, stated, in substance, that the plaintiff was an endorser of a promissory note for one thousand dollars, made by *E. Bristol* and *Justin Higgins*, for their own benefit and accommodation, payable at the office of the *Utica Insurance Company*, to the plaintiff and *Elisha Payne*, and which the plaintiff had become liable to pay; that *E. Bristol* was indebted *to the plaintiff in the sum of one hundred and fifty dollars; that it was agreed between the plaintiff and defendant, and *Bristol*, that *Bristol* should place in the defendant's hands the sum of six hundred dollars in money, and goods to the amount of fifteen hundred dollars; and that the defendant should pay the note, so endorsed by the plaintiff, at the *Utica Insurance Office*, and should indemnify the plaintiff against all moneys, costs, &c. which he might be compelled to pay by reason of his said endorsement, and should also pay to the plaintiff the debt owing to him from *Bristol*. The plaintiff alleged, that *Bristol* had the money and goods ready for the purpose of paying the note and the debt due the plaintiff; and that the plaintiff, instead of receiving the money &c. himself, caused and procured it to be delivered by *Bristol* into the hands of the defendant for the purposes above-mentioned; but that the defendant did not pay the said note so endorsed, &c., nor did he indemnify the plaintiff, &c. according to his promise and undertaking, &c.

The defendant pleaded, 1. *Non assumpsit*; 2. As to the three first counts, the statute for the prevention of frauds, the agreement being a parol undertaking for the debt or default of *Bristol*, and *Bristol & Higgins*. To this plea there was a demurrer, and joinder in demurrer, which was submitted to the court without argument.

Per Curiam. We are of opinion that this is not a case within the statute of frauds. It is not a mere collateral under-

taking, or agreement, on the part of the defendant to pay the debt of *Bristol*; but was an *original* contract, on an independent consideration, received by the defendant, by the procurement of the plaintiff. The plaintiff has the same ground of action as if he had delivered his own goods to the defendant, as the consideration of the promise. (*Cartling v. Aubert*, 2 *East's Rep.* 324.) The plaintiff is, therefore, entitled to judgment.

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Judgment for the plaintiff. (a)

(a) When a promise to pay the debt of a third person arises out of some new consideration of benefit to the promisor, or harm to the promisee, moving to the promisor, or the original debtor, such promise is not within the statute of frauds, though the original debt still subsists, and remains entirely unaffected by the new agreement. *Cleveland v. Farly*, 9. *Cowen's Rep.* 639. 4 *Wid.* 432. 17 *Johns. Rep.* 115.

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THIS was an action of assumpsit, tried at the last circuit in *Clinton* county, before the chief justice. The declaration contained five counts; 1. On a promissory note made by the defendant, dated at *St. Raw*, in *Lower Canada*, the 21st of *June*, 1810, for 1,525 dollars, payable to the plaintiff or order, on the first of *August* following: 2. On the same note, stating an endorsement of it by him to *Joel Ketchum*, and that *K.* afterwards, on the 31st of *July*, 1816, re-assigned the note, it not having been paid, to the plaintiff: 3. For money lent, money paid, and money had and received. 4. For goods sold and delivered. 5. A *quantum valebant* for goods sold, &c.

Where the declaration contains a special count on a promissory note, and, also, the common counts, for money lent, &c., and for goods sold and delivered, &c. the plaintiff may elect the count on which to give the note in evidence.

The defendant pleaded, 1. *Non assumpsit*; 2. The statute of limitations; 3 and 4. A discharge under the insolvent act of 3d of *April*, 1811, and two other pleas, which were disposed of by the court, on demurrer. (*Vide S. C.* 15 *Johns. Rep.* 247.)

Where the defendant pleads his discharge under an insolvent act, passed subsequent to the making of the contract on which the suit was brought, and which would therefore have been bad on demurrer, and the plaintiff, instead of demurring, replies fraud, and goes to trial on the issue as to the

The plaintiff replied to the *second* plea that a *capias* was sued out on the 31st day of *July*, within six years next before, &c., and to the 3d and 4th pleas, that the discharge of the defendant under the insolvent act was fraudulent, &c. The defendant rejoined, taking issue on these replications.

From the caption of the declaration, and the memorandum in the *N. P.* record, it appeared that the suit was commenced on the 17th of *August*, 1816. At the trial, the defendant's

fact of fraud or not, which is found against him; yet, as the plea of such a discharge contains no ground of defence to the action, the court may, notwithstanding the verdict, give judgment for the plaintiff.

The issuing of the writ is the commencement of the suit, in all cases where the time is material, so as to save the statute of limitations. And it is not necessary to show that the writ has been returned, nor that it was actually delivered to the sheriff; but it is sufficient, if it appear that the writ was made out and sent to the sheriff, or his deputy, by mail or otherwise, with a *bona fide*, absolute, and unequivocal intention of having it served.

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counsel called on the plaintiff to elect to which count the note which had been offered in evidence should be applied as there were special defences and different pleas to the several counts, contending that the defendant had a right to have it applied to such count as he pleased, and apply to it the defence set up under such count ; but *the judge ruled that the plaintiff might apply it to any count he pleased. The plaintiff offered to prove, by parol, the time of issuing the writ in order to save the statute ; but it being objected that such evidence was inadmissible, and that the writ ought to be produced, the judge reserved the question, and allowed the evidence to be given. The plaintiff's attorney then testified, that "in the latter part of *July*, 1816, the plaintiff came to his office, in *Granville*, and took the note, and went to *Troy* to get an assignment of it from *Joel Ketchum*, and returned, a day or two before the 31st of *July*, 1816, without the note ; and the witness then made out the writ and entered it in his register, either then or afterwards, as of the 31st of *July*, as that would be the last day before the statute of limitations would attach, in order to give time to have the assignment of the note made in *New-York*, to which place *J. K.* had removed, and to which the plaintiff informed him he had sent the note to be assigned ; that he gave the writ to the plaintiff, with directions not to deliver it to the sheriff before the 31st of *July* ; and sometime afterwards he received the note and assignment by mail from *J. K.*, from *New-York*." The defendant's counsel then insisted that if the making out of the writ was to be considered as the issuing of it, it was issued before the right of action accrued to the plaintiff ; and that the plaintiff was bound to show that the writ was delivered to the sheriff in time to save the statute. The plaintiff then offered to go into evidence under the common counts, and to recover for the original consideration of the note ; and he called a witness, who stated that the note was made at *St. Raw*, in *Lower Canada*, on the 21st of *June*, 1810 ; that the plaintiff and defendant were in partnership in a raft of timber which they had collected, and that *B.* sold his share of the raft to *G.*, which was the consideration of the note. The witness, on his cross examination, stated that the other business of the partnership between the plaintiff and defendant was settled at the same time, and provision made for the payment of the debts of the partnership, &c., that there was an agreement in writing respecting the settlement, and which was delivered to *B.*, with the note. The defendant's counsel objected to the parol evidence altogether, *as there was a special agreement in writing, and the transaction of such a nature as could not be given in evidence under the common counts. The judge reserved the question. The counsel for the defendant then moved for a nonsuit, on the ground that the plaintiff had not given evidence sufficient to entitle him to recover ; and that

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he could not resort to the common counts, &c., and he insisted, that the plaintiff was bound to prove his issue under the replications to the pleas of discharge under the insolvent act, as to which no evidence whatever had been produced. The judge reserved the points; and, by consent, a verdict was taken for the plaintiff, subject to the opinion of the court on all the questions of law and fact, with leave to either party to turn the case into a special verdict. And it was agreed, that if the court should be of opinion that the evidence was not proper, or that the plaintiff was not entitled to recover upon it, under the pleadings, that then judgment should be entered for the defendant, and the issue on the question of fraud be considered as found for the defendant, in case a special verdict was made.

Z. R. Shepherd, for the plaintiff. 1. The plaintiff has the right to elect to which count to apply his evidence; and where he fails to support a count, on a special contract or agreement, he may resort to the general counts. (*Tuttle v. Mayo*, 7 *Johns. Rep.* 132.)

2. The plaintiff was not bound to produce the writ, in order to show the time when it was issued. When the contents of a paper or written instrument are to be shown, the paper itself must be produced, but the existence of such paper may be shown by parol. The writ might now be produced to the court. (2 *Johns. Rep.* 48.) But it would be absurd to require the production of a paper, which, when produced, would prove nothing. The taking out of the *latitat* is the true commencement of a suit in *England*, and the true time may be averred and shown, contrary to the *teste* of the writ. The mere writ would not show the *actual* time of issuing it. (4 *Esp. N. P. Rep.* 100. 2 *Burr.* 959.) The pleadings admit the existence of the *capias*.

*3. The caption of the declaration, and the memorandum of the *N. P.* record, are no more than *prima facie* evidence of the time of issuing the writ, and may be rebutted by parol evidence of the true time of its issuing.

4. But the principal question is, whether the writ was so sued out as to prevent the statute from running against the plaintiff's demand. It is settled, that the issuing of the *capias* is the true commencement of the suit. (1 *Caines*, 69. 3 *Johns. Cas.* 145. 2 *Johns. Rep.* 342.) The writ was made out before the 31st of *July*, and, though before the re-assignment of the note by *Ketchum*, it was sufficient. The note was in the possession of the plaintiff, and was his property; he had a right to sue upon it; and taking the endorsement afterwards, will not defeat the action. The time of the endorsement by *Ketchum*, whether before or after the commencement of the suit, was immaterial, as long as the plaintiff was the true owner of the note. (*Baker v. Arnold*, 1 *Caines*, 269, per *Thompson, J.*) But if this is not the law, still the plaintiff might, under

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the general counts, resort to the original consideration, on producing and canceling the note. A promissory note does not extinguish the antecedent debt. (15 *Johns. Rep.* 247.) When the writ was made out, and the suit commenced, the note was the property of the plaintiff, who could have produced and canceled it at the trial.

5. The agreement in writing, relative to the settlement of the partnership between the plaintiff and defendant, did not relate to the note, and ought not to prevent the plaintiff from giving evidence of the original consideration.

6. The contract was made in 1810, and the defendant was discharged under the act of 1811; according, then, to the decision of this court, in *Roosevelt v. Cebra*, (17 *Johns. Rep.* 109.) which admits the law as laid down by the Supreme Court of the United States in *Sturges v. Crowninshield*, (4 *Wheat. Rep.* 122.) the debt was not discharged.

7. The defendant was not bound to prove the issues on the pleas of a discharge under the insolvent act, as they are immaterial, it appearing that the cause of action accrued before passing the act. Judgment may be given upon them, notwithstanding the verdict. *Tidd's Pr.* 828. 2 *Saund.* *319. n. 6. 5 *Comyn's Dig.* 511. (R. 18.) *Cro. Eliz.* 227. 241. 1 *Str.* 394.)

Walworth, contra. The defendant was bound to make out the issue as to his discharge under the insolvent act. The cause of action, as laid in the declaration, arises after the act. The plaintiff should have replied the fact, that it was before the act, in order to bring the case within the decision of the Supreme Court of the *United States*. Electing, however, another ground, that the discharge was fraudulent, he was bound to prove that issue. He cannot rely on facts *dehors* the record, to show that the issue was immaterial.

It appears that the note was in the hands of *Ketchum* when the suit was actually commenced, and the plaintiff seeks to recover on a subsequent assignment to him. The facts stated are not sufficient to raise an implied *assumpsit* to pay to the plaintiff. The mode of transferring a negotiable note is by endorsement, which raises an implied *assumpsit*. An assignment creates an express *assumpsit*. This is an attempt to support an implied *assumpsit*, on a distinct assignment. The plaintiff grounds his action on the fact, that the note was re-assigned by *K.* under his hand and seal, in consideration of which the defendant undertook and promised to pay the plaintiff. He cannot now rely on the fact, that he was owner of the note before the assignment.

Again; the plaintiff ought to have shown the true time of commencing the action; and for that purpose he should have produced the writ, that the court might see whether it had been returned by the sheriff. For aught that appears, the at-

torney may have kept the writ in his pocket. It should be proved that the writ was delivered to the sheriff. In *Brown v. Babington*, (2 Lord Raym. 883.) and in *Harris v. Woolford*, (6 Term. Rep. 617.) it was held, that in order to save the statute, it is not enough to show merely that a writ was sued out, but the plaintiff must show that it has been returned. At least, a delivery of the writ to the sheriff is requisite; (*Bronson v. Earl*, 17 Johns. Rep. 65.) and there is no evidence whatever of that fact. It is admitted *that the caption of the *nisi prius* record is *prima facie* evidence of the time of commencing the suit. The defendant holds the affirmative of the plea of the statute; and the plaintiff, by replying the fact of the commencement of the suit within the six years, holds the affirmative as to that fact, and must show not only the existence of the writ, but that it was duly issued in time. (*Garland v. Chattle*, 12 Johns. Rep. 430.)

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Again; the defendant having established a legal and technical defence to the special counts, the plaintiff cannot resort to the common counts. There is no variance between the count on the note and the proof. The plaintiff sets out one cause of action, to which the defendant makes out a complete bar; can the plaintiff then resort to another cause of action? (2 Term Rep. 172.) The defendant came prepared to defend himself against the special counts; it would be a surprise upon him, if the plaintiff is allowed to resort to the money counts. Suppose the defendant had pleaded payment of the note, and had come prepared to prove the fact, would the plaintiff be allowed to abandon the count on the note, and resort to the common counts? (7 Term Rep. 727.)

But the plaintiff, on the evidence, was not entitled to recover on the common counts. A note is *prima facie* evidence of money lent, &c. If the plaintiff shows that the note was given for something else than money, he cannot recover under the count for goods sold and delivered. Here were, in fact, no goods actually sold and delivered. The note was given on the settlement of a partnership concern.

Shepherd, in reply, said, that sending the writ to the sheriff was issuing it, and that it was not necessary to show it returned. Each count in a declaration states a distinct cause of action; and if the plaintiff fails to support one count, it does not prevent his proving another, and recovering on it.

PLATT, J., delivered the opinion of the court. The case states, that "from the caption of the declaration, and the memorandum of the *nisi prius* record, it appeared that *the suit was commenced on the 17th of August, 1816." But I presume that those relate to the *filing of the bill*, or declaration.

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At the trial a question was raised, whether the plaintiff had

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a right to elect his count, on which he would apply the note declared on; and it was properly ruled that he might. (a)

No attempt was made to prove that the discharge, under the insolvent act, was fraudulent; nor was there any evidence offered in relation to that discharge.

The discharge being formally pleaded by the defendant, and the plaintiff having replied fraud, the discharge was admitted by the pleadings. But as it appears on the face of the pleadings, that the contracts declared on were made prior to the insolvent act of 1811, under the late decision of the Supreme Court of the *United States*, the plaintiff might have successfully demurred to that plea; and although he has not done so, and has chosen to go to trial upon the issue of fact, that is, fraud or no fraud in the discharge, and that issue must be considered as found against him; yet as the allegation in the plea, if true, contains no ground of defence, we should be justified in rendering judgment for the plaintiff on that point, *verdicto non obstante*.

But we are of opinion, that the defence was complete, under the plea of the statute of limitations. The note was due, and the whole cause of action arose, on the 1st day of *August*, 1810. There is no doubt as to the rule, that the *issuing of the writ* is the commencement of the suit, in all cases where the time is material. The question on this evidence is, whether the plaintiff has proved that the *capias* was sued out before the six years expired. (b)

We do not think that it is indispensably necessary, in such cases, to prove an actual delivery of the writ to the sheriff; provided it be shown, that it was actually made out and sent to the sheriff, or his deputy, by mail, or otherwise, with a *bona fide* and *absolute intention* of having it served. But such intention must be positive and unequivocal.

The evidence is not satisfactory on that point. The writ is proved to have been made out by the attorney, and delivered to the plaintiff, before the note was re-assigned to *the plaintiff; and, of course, before his cause of action accrued. At that time the note belonged to *Ketchum*. The attorney directed the plaintiff not to deliver the writ to the sheriff till the 31st of *July*. The whole transaction shows, that it was uncertain when, if ever, the note would be re-assigned by *Ketchum* to the plaintiff; and in issuing the writ, no respect was had to any other cause of action than the note itself; and it is fairly to be inferred, that if the note had not been obtained from *Ketchum*, the writ would have been suppressed by the plaintiff, and never delivered to the sheriff. The re-assignment of the note by *Ketchum* to the plaintiff, bears date the 31st of *July*, 1816, at *New-York* and was sent, by mail, from thence to *Granville*. There is no evidence when it was actually received; but it could not have

(a) *Linningdale v. Livingston*, 10 Johns. Rep. *Robertson v. Lynch*, post, 451.

(b) *Ross v. Luther*, 4 Cowen's Rep. 161. *Vischer v. Ganscoort*, post, 496

reached *Granville*, until *after* the 31st of *July*, 1816. It is not shown *when* the writ was delivered to the sheriff; and the reasonable presumption is, that all remained in suspense, and that there was no *positive intention* to institute a suit until the note was actually received by the plaintiff's attorney from *Ketchum*; and then the attorney entered the suit in his register, he says, "as of the 31st of *July*, 1816." The truth, no doubt, is, that he received the assigned note after the six years had expired; and he, probably, then antedated the entry of the suit in his register; which entry never would have appeared in his register, if *Ketchum* had refused to re-assign the note. Such re-assignment was an event *uncertain* at the time the attorney gave the writ to his client, to be used or not, according to that contingency; and the plaintiff could not make his election, whether to consider the suit commenced or not, until the contingency was known to him; which was not until after six years had elapsed.

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Upon this view of the subject, it is immaterial which count the plaintiff elected to claim under; for if he relies on the original ground of indebtedness, as for goods sold, &c. the evidence is equally strong to show that the writ was not issued with an absolute and unconditional intention of having it served, until after the statute had run six years.

Besides, the original agreement, upon the dissolution of the partnership between the plaintiff and defendant, which *formed the consideration of the note, was reduced to writing at the time, and signed by the parties; and the objection was well taken at the trial, that the contract could not be proved by *parol*. The plaintiff failed to produce the written agreement, and, on that ground, the claim *as for goods sold*, &c. failed.

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A verdict was taken for the plaintiff, subject to the opinion of the court, upon all the questions of law and fact.

We are of opinion that the defendant is entitled to judgment, pursuant to the stipulation in the case.

Judgment for the defendant.

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CAMP
v.
ROOT.

CAMP AND ANOTHER, *administrators of Clark, against*
Root.

Where the parties in an action of replevin in a court of C. P. entered into a written agreement to refer the cause to B. to be determined by him on legal principles, and thereupon a rule was entered that the cause be referred to B. to be heard and determined by him, and that he report to the court; and B. made a report, on which the [* 23]

court below immediately gave judgment: *Held*, that this not being a case referable under the statute, but a voluntary submission to the arbitration of B., it was a discontinuance of the suit, and the court having no jurisdiction, the judgment on the award or report was erroneous.

IN ERROR to the Court of Common Pleas of Oneida county. Root brought an action of replevin against Camp and Ann Clark, administrators, &c., in which the defendants avowed a taking for rent, &c. The plaintiffs pleaded in bar to the avowries; to which pleas there was a demurrer and joinder. The parties, by their attorneys, entered into a written agreement, or rule by consent, referring this and two other actions to Ezekiel Bacon, to be determined on legal principles; and a rule was accordingly entered in the court below, as follows: "It is ordered that this cause be referred to Ezekiel Bacon, Esq., by him to be heard, examined, and determined, and that he report to this court." The referee afterwards, on the 14th October, 1818, made a report in writing, as follows, to wit: "Upon hearing the parties to the submission, by themselves and their counsel, and after full consideration of their respective pleas and allegations, I find," &c.—"I do, therefore, award and determine that the plaintiff recover for the illegal taking, &c. six cents damages." Root, by his attorney, moved that the report be confirmed, and for judgment thereon, for the damages *reported and the costs of suit; and the court below thereupon gave judgment accordingly, for the damages, and 48 dollars and 30 cents costs.

Sill for the plaintiffs in error.

N. Williams, contra.

Per Curiam. This is plainly a case of submission to arbitration; it is, in no respect, a reference under the statute. The parties chose to enter their submission upon the minutes of the court, and to direct the arbitrator to make report to the court; but all this does not vary the rights of the parties, nor authorize the court to give judgment immediately on the award.

The submission to arbitration was a discontinuance of the suit.

In the case of *Yates v. Russell*, in the Court of Errors, (a) it was expressly stipulated by the attorney for the defendant, that if the referees reported against him, judgment should be entered against him for the sum so reported. And that was considered equivalent to a plea of confession for that amount. But in this case there is no such stipulation. We are, therefore, of opinion, that Mr. Bacon's report is to be regarded as an award merely; and that the judgment thus summarily entered upon it was erroneous.

Judgment of reversal.

(a) Vide 17
Johns
Rep.
461.

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*TOLAND against MURRAY AND MURRAY.

TOLAND

v.

MURRAY.

THIS was an action of *assumpsit*, brought to recover the value of goods consigned by the plaintiff to the defendants, to be sold by them, as his factors.

The plaintiff's counsel, at the trial, stated, that the plaintiff and *Richard M. Mead*, of *Cadiz*, owned a quantity of tin. It was proved that early in the year 1813, *Mead* shipped the tin from *Cadiz*, consigned to the plaintiff, residing in *Philadelphia*, to be sold for their joint account. The ship arrived at *New-York*, and the plaintiff sent the invoice and bill of lading to the defendants, with instructions to sell the tin. The defendants sold, and rendered an account of sales; but refused to account for the proceeds of 264 boxes, &c., alleged to be the share of *Mead*, and against whom they claimed the right to set off the amount of a claim against *Mead*, or to retain it to indemnify them for an alleged violation of a contract between him and *J. B. M.*, one of the defendants.

Where *M.*, a merchant abroad, consigned goods to *T.* for sale for his account, and *T.* sent them to the defendants for sale; *Held*, that the defendants were bound to account to *T.* for the proceeds, as their principal, and could not retain them to satisfy a demand of their own against *M.*, and that *T.* might maintain the action in his own name.

The defendants' counsel moved for a nonsuit, on the ground that plaintiff and *Mead* were joint owners of the tin, and that the suit should have been in their names jointly; and because, if the plaintiff could be considered as bringing the action for account of *Mead*, it should have been commenced in the name of *Mead*, as both plaintiff and defendants were his factors. The court overruled the motion, and decided, that, as between the plaintiff and defendants, the former was to be deemed the sole owner of the whole of the tin, and entitled to bring the action in his own name. And the jury, under the direction of the judge, found a verdict for the plaintiff.

H. Sedgwick, for the defendants, moved to set aside the nonsuit. 1. It is a well-settled rule, that in all actions arising *ex contractu*, where the interest is in several persons, all of them, if living, must be joined in the action. *(*Dob v. Halsey*, 16 *Johns. Rep.* 34—40. 1 *Chitty Pl.* 6, 7. 1 *Saund.* 153. n. 1. 291 f. n.)

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2. The defendants, as factors of *Mead*, have a *lien* on this property. A factor, who becomes *surety* for his principal, has a *lien* on the goods sold by him for his principal to the amount for which he has become *surety*. (*Drinkwater v. Goodwin*, *Coup.* 251, 256.) If a factor sells goods in his own name, the vendee may set off any demand he may have against the factor, in a suit brought by the principal. (*George v. Claggett*, 7 *Term Rep.* 359, and notes, 360, 361. *Houghton v. Matthews*, 3 *Bos. and Pull.* 435.) The plaintiff did not appear in the character of a factor, but as a joint owner of the goods with *Mead*.

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to stay the proceedings in this cause admits, that *the* property in the tin was in *Mead*. Notice was given to the defendants to produce the original invoice and bill of lading, which they have declined to do; the court are then warranted to conclude that the tin was the property of *M.*, and that the plaintiff was his factor; and having sent it to the defendants for sale, they became his factors. There is no privity between them and *M.*, the principal. A sub-factor cannot hold goods consigned to him by a factor, for any debt due from the owner. (2 *East*, 523. *Cowper*, 251.) A factor cannot dispute the title of his principal. In regard to the transaction between these parties, the plaintiff is the principal, and the defendants his factors. This question was considered and decided by the chancellor, when the case was before him. (3 *Johns. Ch. Rep.* 569.)

Per Curiam. We see no reason to doubt the correctness of the decision at *Nisi Prius*. It is immaterial who was the real owner of the goods. They were received by the defendants of the plaintiff, who had a lawful right to commission them to sell the goods as his sub-agents. They must account to him, as their immediate principal, so that he may settle with *Mead*. *Toland* has a prior lien on the goods, for advances which he may have made; and he has a right to compel the defendants to account to him. (*Drinkwater v. Goodwin*, *Cowp.* 251. 3 *Johns. Ch. Rep.* 573.)

Motion for a new trial denied. (a)

Judgment for the plaintiff.

(a) Vide *Girard v. Taggart*, 5 *Sug. & Rawle's Rep.* 37

HARRIS against BRADSHAW.

No action lies upon a report of referees made pursuant to a rule of a court of common pleas, entered by consent of the parties in an action of *assumpsit*, though the cause did not require the examination of a long account, nor was it referable under the statute. For it is not an *award*, and the party is concluded by the rule of reference entered by his consent, from alleging that it was not referable under the statute; and the court might give judgment on the report, it being in a suit on a *contract*; though if it had been an action for a *tort*, the jurisdiction of the court to refer it might be objected to.

THIS was an action of *assumpsit*, on the report of referees. The declaration stated a special contract between the parties, by which the plaintiff sold to the defendant 110 pine trees, &c., for which the defendant was to give one dollar each, &c; on which contract, the plaintiff, in May, 1811, brought an action of *assumpsit* against the defendant, in the Court of Common Pleas, of *Washington* county, in which the defendant pleaded *non assumpsit*; that on the 9th of *December*, 1815, by the consent of the parties, a rule was entered in the Court of Common Pleas, ordering the cause to be referred to three referees named,

and that they, or any two of them, report thereon; that the cause did not require the examination of a long account, nor was it referable under the statute; that the referees met and heard the parties, and two of them signed a report in favor of the plaintiff, for 93 dollars and 41 cents, whereby an action had accrued, &c. The case further stated, that on this report a judgment was entered in the Court of Common Pleas, which was afterwards vacated, but for what cause did not appear.

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The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. This is an action of *assumpsit* on the report of referees, or, as the plaintiff contends, on the award of arbitrators.

The plaintiff insists, that as the original action did not involve the examination of long accounts, it was not referable under the statute, and that therefore it may be treated as a *submission to arbitration, and then it becomes a proper subject of an action.

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I am satisfied, that had the Court of Common Pleas given judgment for the plaintiff on the report, that such judgment would have been above all exception; for although, strictly speaking, the case might not have required the examination of long accounts, the consent of the parties to a reference would have concluded them from making the objection, because, it being an action of *assumpsit*, there might have been long accounts. The reference was an admission that the case was within the act, and the Court of Common Pleas would never have listened to an objection to the contrary. Had the action been in *tort*, then the objection to the jurisdiction of the court to refer the cause would have been open to either party, on a writ of error.

I do not think the plaintiff can treat the report as an award, and sue upon it. The differences between the parties were not referred, but the cause pending in court was referred; and so the parties considered it, for the plaintiff entered a judgment. This judgment was vacated, upon what grounds we are not informed, but we must intend for good and valid reasons; and it appears to me that the vacating the rule for judgment annulled the report. The Court of Common Pleas had jurisdiction, and their rule, unless itself vacated, put an end to the effect of the report.

This left the plaintiff where he was before, at liberty to go to trial in the original cause. We are, therefore, of opinion, that this action on the report cannot be sustained.

Judgment for the defendant. (a)

(a) *Ante*, page 23.

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HALLETT

v.

HOLMES.

Where a plea, at its commencement, purports to be an answer to the whole declaration, but answers only a part of it, it is bad.

Where the general issue is pleaded, and a special plea, to which there is a replication and a demurrer, and contingent damages are assessed on the trial of the general issue, and the demurrer is afterwards argued, the court will not allow the party to amend the plea; otherwise, if the demurrer had been argued before the trial of the issue.

It seems, that if the holder of a note sue the maker, and issue is joined in the cause, and the plaintiff afterwards takes a *relicta* and *cognovit*, and gives the defendant a stipulation not to is-

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sue execution on the judgment to be entered upon the *cognovit*, until a certain day thereafter, before which day, according to the course and practice of the court, he could not have brought the cause to trial and obtained a judgment, this is not such an indulgence or giving time to the maker as will discharge the endorser.

*HALLETT against HOLMES.

THIS was an action of *assumpsit* on a promissory note made by Joseph E. Haff, the 26th September, 1818, payable to the defendant, ninety days after date, and endorsed by him to the plaintiff. The declaration contained a count on the promissory notes, and counts for money paid, laid out, &c. money lent, and money had and received, &c. The defendant pleaded, 1. *Non assumpsit*. 2. That the plaintiff ought not to have and maintain his action, &c. because, &c. that after an action was brought in this court against Haff, the maker, and before this suit was commenced, the plaintiff, without the consent or knowledge of the defendant, substituted the following contract in the place and stead of the promissory note, and agreed with Haff, in consideration that he, the said Haff, would give to the plaintiff a *relicta* and *cognovit* in that action, he, the plaintiff, would give indulgence and further time of payment to the said Haff, of the said note, with the interest; and the defendant averred, that in pursuance of this agreement, and without the knowledge and consent of the defendant, the said Haff signed and delivered to the plaintiff, a *relicta* and *cognovit* in that action, for the sum due on the note, with interest, being 847 dollars and 47 cents; and the plaintiff, in consideration thereof, delivered to the said Haff an agreement and stipulation in writing, by which he gave indulgence and further time to the said Haff for the payment of the said moneys, &c., without notice to the defendant, from the 14th of April, to the 21st day of October, 1819, before which last mentioned day, the said Haff became insolvent, &c., and absconded from the state, &c., all which the defendant is ready to verify, &c., wherefore he prayed judgment, &c. The plaintiff replied, that the issue joined in the suit against Haff was an issue in fact, and triable only by a jury in the county of Albany, where the venue was laid, and that at the time of receiving *the *relicta* and *cognovit* mentioned in the said plea, such was the state of the suit, that, by the rules and practice of the court, &c., the issue could not be brought to trial until the 5th day of October, 1819, and no judgment could have been obtained or execution issued, except by means of a *relicta* and *cognovit*, at any time before the 21st of October, 1819; and that the attorney of the plaintiff in that suit, in order to obtain a *lien* on the land and real estate of the said Haff, sooner than by the rules and practice of the court, &c. could otherwise have been obtained, did receive the said *relicta* and *cognovit* on the 14th of April, 1819, and containing a proviso that no execution should be issued on the judgment to be entered up thereon, until the 21st of October, 1819: and

gave to the said *Haff* a receipt for the said *relicta* and *cognovit*, with a stay of execution, &c., averring that this was the only agreement made with the said *Haff*, and traversing several matters contained in the plea, and concluding with a verification, &c.

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To this replication, the defendant demurred, and assigned causes of demurrer: 1. That it does not deny that issue was joined in the said suit against *Haff*, but to evade the force thereof, attempts to put in issue the venue laid, and time of trial, the time of judgment, &c., and the rules of the court, and the statute, &c., all which matters are not necessary to be alleged, and which are no answer to the plea. 2. That the replication admits the receiving of the *relicta* and *cognovit*, and the agreement in writing, as alleged in the plea, but, nevertheless, traverses the inferences and conclusions of law arising from those facts. 3. That the replication admits the facts set forth in the plea, and, afterwards, traverses the same facts. 4. That the plaintiff traverses the whole matter of the said plea, and concludes with a verification, whereas the replication should have concluded to the country, &c.

The demurrer was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The plaintiff takes an exception to the plea, that it purports to be an answer to the whole declaration, and is only an answer *to part. If the objection is true, in point of fact, the law is well settled, that the plea is bad. (1 *Saund.* 28. note 3. and the cases there cited. 1 *Chitty Pl.* 510.) It is an established rule, upon the argument of a demurrer, to give judgment against the party whose pleading is first defective in substance. The plea begins with an answer to the whole declaration, but it confines the agreement set up to the giving a *cognovit* on the note only, and it does not go on to state, that judgment was entered on that *cognovit*; it makes no answer to the plaintiff's counts for money paid and laid out, for money lent, or for money had and received. We cannot know but that these counts embrace substantive and distinct causes of action. The matter pleaded extends only to the note, and leaves the other counts unanswered. Had the plea begun only as an answer to part, and answered only a part of the declaration, the plaintiff must have taken his judgment for the part unanswered, by *nil dicit*; but here the defendant says, "that the plaintiff ought not to have or maintain his aforesaid action thereof against him, because," &c., thus beginning his plea to the whole cause of action, and answering only to the first count. This objection is, therefore, fatal. (a)

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If the plea was good in substance in other respects, and a meritorious plea, the court would ordinarily give the party leave

(a) See *Nevins v. Keeler*, 6 *Johns. Rep.* 63. *Van Ness v. Hamilton*, 19 *Johns. Rep.* 349.

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to amend, but it appears that contingent damages have been assessed on the general issue, upon an inquest at the last *Rensselaer* circuit. In *Robinson v. Rayley*, (1 *Burr. Rep.* 321.) a motion was made to withdraw the demurrers and amend, after argument, and before judgment, and after a trial and contingent damages. Lord *Mansfield* said, no case of such an amendment after trial had been cited, and that he took it for granted, none existed. Mr. Justice *Denison* said, that where the demurrer is first argued, the court will give leave to amend; but there never was an instance of amending an issue at law after a verdict had been found upon issues in fact, and contingent damages assessed on the demurrers.

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Upon the merits of the case, it is unnecessary to speak; but I have no hesitation in saying, that if we are to regard the facts stated in the replication, as the real facts in the *case, there is no pretence for saying, that the plaintiff gave time or indulgence to *Haff*, the drawer of the note. It is not brought within the case of *English v. Darley*, (2 *B. & P.* 61.) There the endorsee, having proceeded to judgment against the acceptor, and taken out execution, received a sum in part payment, and took his security for the remainder, payable in instalments; and it was held, that he was thereby precluded from afterwards suing the endorser. Lord *Eldon* said, "If a holder enter into an agreement with a prior endorser in the morning, not to sue him for a certain period, and then oblige a subsequent endorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder had pledged his faith, that he shall not be sued." This is not such a case; no delay was granted; and the confession of judgment was a benefit to the endorser, because, if entered up, it acquired a *lien* on the reality, and the only effect of the arrangement was, that the judgment was expedited. (a)

Judgment for the plaintiff.

(a) Vide *Wood v. Jefferson County Bank*, 9 *Cowen's Rep.* 194. 203. *Lynch v. Reynold*, 16 *Johns. Rep.* 41.

JACKSON, *ex dem.* RUGGLES, against MARTIN.

Where a testator devised a farm and messuage to his son, without words of inheritance, or expressing the quantity of the estate devised; he complying with the directions of the testator, to furnish his mother with firewood and grain of all sorts, for her comfortable support; and in case she should not choose to live in the dwelling-house (included in the estate so devised) in the event of his son's marriage, that then he should build a house for her, on another part of the testator's land; this was held to be a charge on the *person* of the devisee, in respect to the estate devised, and that the devisee took an estate in *fee* by implication; but without this *personal* charge, or had it been on the *estate*, the devisee would have taken an estate for life only. (a)

EJECTMENT for lands in *New Windsor*, in the county of *Orange*. The parties agreed upon the following case, with

(a) Vide *Shauber v. Jackson*, 2 *Wendell's Rep.* 14.

liberty to either party to turn the same into a special verdict: *Henry M'Neely*, being seised of a large real estate, made his will, dated *August 31, 1795*, in which he devised, as follows: "As for that worldly estate, wherewith it hath pleased God to bless me, I dispose thereof as follows: *First*, I give and bequeath unto my loving wife *Sarah, M.* any room in my dwelling-house. that she may choose to live in, after my decease. I, also, give her one cow, and fodder and pasture for both summer and winter, *from my homestead *farm*, for and during her life. I also give her of the produce and profits of my said farm, in such proportion of either, so as to render her a comfortable support through life.

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"I give and bequeath to my eldest son, *David M'Neely*, in addition to what I gave him heretofore, five pounds, to be paid him out of my real estate. I give and devise to my second son, *Robert M'Neely*, 118 acres of land, to be taken off the southerly end of my homestead farm, including my dwelling-house, and other improvements, to be cut off by a line running parallel to the southerly side of my said farm; he complying with the following injunctions; that is, he, my said son *Robert*, shall allow to his said mother any room in my said dwelling-house, that she may choose to live in, and keeping for her one cow, summer and winter, and to furnish her with a sufficient quantity of firewood and grain of all sorts, for her comfortable support. He my said son shall also allow to my daughter *Ruth*, one other room in my said dwelling-house, so long as she remains unmarried, and no longer. I further give and bequeath unto him, my said son *Robert*, one sorrel horse which is now six years old; but in case my said son *Robert* neglects or refuses to provide for his mother as aforesaid, or in case she should not choose to live with him, if he marries a wife, in that case, I order that he build her a house on that part of my homestead farm, that is hereafter devised to my fourth son, *James M.*, and to provide for her, as aforesaid, or otherwise, to pay her fourteen pounds yearly, and every year, during her natural life. I give and devise to my fourth son, *James M.*, the remaining one hundred acres of my homestead farm, lying between the one hundred acres I lately conveyed, by deed and gift, to my eldest son, *David M.* and that first devised to my second son, *Robert*; the division to be made so between my said sons, *Robert*, and *James*, as to include the island field in *James's* part, he paying the legacies hereafter named." The testator then gave personal legacies to his daughter *Ruth*, and added, "And it is further my will, that if my son *James M'Neely* should die under age, not having lawful issue, in that case I give and devise his one hundred acres to my son *Robert M.* and he to pay the legacy of one hundred *pounds to his sister as aforesaid. It is further my will, that if my son *Robert M.*, should die, not having lawful issue, in that case I give and devise his one hundred and eighteen acres to my son *James M.*, and he to provide

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for his mother, in the same manner as *Robert* was to have done. Whatever remains of my personal estate, after the death of my wife, and after my just debts are paid, I give and bequeath the same to my son *Robert*." The testator died prior to the year 1800. *Robert M.* leased the farm devised to him. The widow of the testator died in *July*, 1813. On the 2d of *October*, 1807, while the premises were occupied by the lessee of *Robert*, he sold and conveyed the premises in fee to *D. Stringham*, for three thousand dollars. *Ruth*, the sister, in *May*, 1812, also conveyed all her share or right in her father's estate, to *S.*, who also purchased the premises which were sold by the sheriff under a judgment and execution against *Robert*, in 1811. *Stringham* conveyed the premises to *George Monell*, who conveyed the same to *H. R.*, who sold and conveyed them to the lessor of the plaintiff.

James M Neely died under age, without lawful issue, and *Robert* survived him, and died in *April*, 1814, without lawful issue.

Betts, for the plaintiff, contended, that *Robert M.*, the testator's second son, took an estate in fee under the will. It is manifest, from the introductory clause, as well as other parts of the will, that the testator intended not to die intestate, but to devise his whole estate. (6 *Johns. Rep.* 191. 4 *Yeats's Rep.* 180. 1 *Dallas*, 226. 16 *Johns. Rep.* 537.) The word estate is sufficient to carry a fee. But the testator having imposed a charge on *Robert*, in respect to the estate devised, which is personal, he must be considered as taking a fee by implication. This is the settled law; (8 *Johns. Rep.* 141. 10 *Johns. Rep.* 140. 6 *Johns. Rep.* 191. 5 *Bos. & Pull.* 430. 3 *Burr.* 1623. 5 *Term Rep.* 13. 8 *Term Rep.* 1. *Cruise's Dig. Devise*, tit. 38. ch. 11. s. 49.) and it makes no difference whether the charge is great or small.

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H. Bleecker, contra, contended, that *Robert* took an estate *for life only, there being no words of perpetuity. (*Cruise's Dig. Devise*, tit. 38. ch. 11. s. 10. 16. 9 *Johns. Rep.* 222. 1 *Johns. Rep.* 198.) The introductory words to a will are not, of themselves, sufficient to give a construction to it, unless the testator, afterwards, use words sufficient to carry his intention to dispose of all his estate into effect. (8 *Johns. Rep.* 144. 11 *East*, 219. 9 *Term Rep.* 54.)

Again; the charge upon *Robert*, the devisee, was not an absolute and certain charge on his person. The testator had before made the same provisions for the support of his wife, during her life, out of his estate, and he gives the part devised to *R.*, subject to the charge. The charge is on the testator's whole farm; not on the particular part devised to *R.* (10 *Johns. Rep.* 148. 5 *Bos. & Pull.* 343.) Where it is contingent, whether the devisee will be liable to the charge, he takes only

an estate for life. (8 *Johns. Rep.* 141. 2 *Atk.* 341. 6 *Co.* 16. *n. Dyer*, 371. *b. 8 East*, 141.)

Suppose, however, that these charges were sufficient to raise a fee by implication, the testator says, that if *Robert* dies without issue, then the estate devised was to go over to *James*; and *Robert* and *James* both died without issue. (3 *Burr.* 1623.)

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SPENCER, Ch. J., delivered the opinion of the court. The title of the plaintiff to recover, depends principally upon that clause in the will of *Henry M'Neely*, in which he devises 118 acres to his son *Robert*, to be taken off the southerly end of his homestead farm. The devise of this portion of his estate contains no words of inheritance or perpetuity; after describing the 118 acres, the will proceeds, "*he complying with the following injunctions, that is, he, my said son Robert, shall allow to his said mother any room in my said dwelling-house that she may choose to live in, and keeping for her one cow, summer and winter, and to furnish her with sufficient quantity of fire-wood and grain of all sorts, for her comfortable support.*"

In the next clause of the will there is this direction, "*But in case my said son Robert neglects or refuses to provide for his mother as aforesaid, or in case she should not choose to live with him, if he marries a wife, in that case, I order that he *build her a house on that part of my homestead farm that is hereafter devised to my fourth son, James M'Neely, and to provide for her as aforesaid, or, otherwise, to pay her fourteen pounds yearly, and every year, during her natural life.*"

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By a previous devise to the testator's wife, he had given her any room in his house that she may choose; "*also, one cow, and fodder and pasture for both summer and winter, from his homestead farm, for, and during her life, and of the profits and produce of his said farm, such proportion of either as to render her a comfortable support through life.*"

These are all the devises bearing on the point argued; and the question is, whether *Robert M'Neely* took an estate for life only, in 118 acres devised to him, or a fee. All the cases on the question were ably examined by the present chancellor, in *Jackson v. Bull*, (10 *Johns. Rep.* 151.) He there said, that the distinction is, that where the charge is upon the estate, and there are no words of limitation, the devisee takes only an estate for life; but where the charge is on the person of the devisee, in respect of the estate in his hands, he takes a fee, on the principle that he might otherwise be a loser. When the charge is on the person, he said, the devisee takes the estate on condition of paying the charge, and if he die in the lifetime of the testator, the charge ceases; or if he refuse to accept and perform, the devise is void, and the heir may enter; and it was well observed, on that occasion, that the cases on this point are not altogether consistent. Where the devise was,

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"he paying," &c. and "so that she pay," &c. there are several cases, and particularly *Colyer's case*, (6 Co. Rep. 16.) which has always been regarded as high authority, which decide, that these expressions create a charge on the person, and convey a fee. So, where the words were, "all the rest of my goods and lands I give to A., to discharge all things charged in my will;" and, in another case, "my legacies and funeral expenses being thereout paid;" in these cases the devisee was held to take a fee.

It will be observed that in this case, the testator devised expressly to his wife, certain things which he enjoined on *Robert* to provide for her the choice of a room, keeping a cow in summer and winter, and the profits and produce of his farm, for her comfortable support. The furnishing the grain is not, *eo nomine*, mentioned in the devise to her; but there is no devise to her of fire-wood, nor is there any provision for building her a house, in the events specified in the will, except the injunction upon *Robert*.

I am satisfied, that the direction with respect to the fire wood, and building a house for his mother, was a personal charge upon *Robert*, in respect to the land given to him, and not upon the land in his hands, and that had he died in the life-time of the testator, or had he refused to accept the devise, the testator's widow could not have enforced the performance of these specific duties, as against the heirs of the land devised.

The devise to *Robert* is a conditional one, "he complying with the following injunctions," &c., and the cases to which I have alluded, appear to me to be precisely in point. Again, the building the house, though a contingent thing, was a direct charge upon the person of *Robert*, and the devise to him depended on his performing that injunction.

I do not mean to say, that the devise to the wife of so much of the profits and the produce of the farm, as will render her a comfortable support, means the same thing as the charge upon *Robert*, to furnish her a sufficient quantity of grain of all sorts, for her comfortable support; for the farm may not have yielded grain enough, or it might have been destroyed, without *Robert's* fault; and yet he was bound to provide it. There is great force in the argument, that this, also, was a personal charge in respect to the land devised.

I do not know that the case can be further illustrated. The decisions on the construction of wills, when applicable, and when uniform, become a rule of property; and it is the duty of the court to compare the adjudged cases with, and apply them to, the case to be decided, without indulging themselves in speculations of their own, on the rationality of the distinctions taken by those who have preceded them. The lessor having deduced a title under *Robert M'Neely*, and the court being of opinion that he took a fee in the 118 acres devised to

him, the plaintiff is entitled to judgment according to the stipulation in the case.

Judgment for the plaintiff.

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JACKSON
v.
BROWNER

JACKSON, *ex dem.* GARLAND and others, *against*
BROWNER.

EJECTMENT to recover part of great lot, No. 4. in *M'Neil's* patent, in the town of *Danube*, tried before Mr. Justice Yates, at the *Herkimer circuit*, in June, 1819.

The plaintiff gave in evidence letters patent, dated August 15, 1761, to John *M'Neil*, Alexander Stewart and others, for a tract of 3,400 acres of land, in *Danube*, including the premises in question; also, a deed of partition, by which lot No. 4. became the separate property of *M'Neil*.

George Shall, a witness of the plaintiff, testified, that *M.*, the patentee, left this country before the revolutionary war, and went to *Ireland*, where he soon after died. That part of lot No. 4. is held under deeds from the patentee, and part under Luke Owens, who claimed an undivided part of the lot, under a deed from Thomas Garland, whose mother, as the witness understood from Owens, was a sister of *M.*, the patentee. The witness further stated, that he understood from Owens that *M.* had several sisters; that Garland, under whom Owens claimed, was a sailor, and had come from *Ireland*. The witness further testified, that the defendant holds part of lot No. 4. under one Keller, who claimed under *M'Neil*.

Alexander M'Kinnon, another witness for the plaintiff, testified, that he was born in *Ballycastle*, in *Ireland*, and was thirty-three years old; that he left *Ballycastle* about ten years ago; that he knew Daniel M'Clean, and that his parents were dead. That he frequently heard of John M'Neil, in *Ballycastle*: that he understood from the physician who attended him and others, that *M'Neil* died many years before the witness's recollection; that he had frequently seen the house in which *M'Neil* died; that he understood that he left no children, and had four sisters, one of whom married M'Clean, one married M'Clister, another O'Hale, and another married Garland. That he understood that D. M'Clean was the son of a sister of *M'Neil*. That Mrs. M'Clister had a son named John; that Mrs. O'Hale died without issue, and Mrs. Garland had two children, named Thomas and Mary. The witness further stated, that he knew Garland; that he lived in *Ballycastle*, and was a sailor in the latter part of his life. That before the wit-

Though hearsay and reputation may be received as evidence to prove pedigree, yet where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected or particularly acquainted with the family, but speak generally of what they have heard and understood, such evidence is insufficient for that purpose. (a)

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(a) Vide Jackson v. Cooley, 8 Johns. Rep. 131. Jackson v. King, 5 Cowen, 237.

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ness left *Ireland*, he understood from *M'Clean* and the other heirs of *M'Neil*, that they owned lands in this country, as heirs of *M'Neil*. That when he left *Ireland*, he was entrusted by the heirs of *M'Neil* with a packet of papers, directed to Mr. *Hill*, of *Albany*, which he understood related to their lands in this country.

Ezekiel M'Kinnon, another witness, testified, that he understood that *John M'Neil* died without children, and had four sisters, who were married, to wit, Mrs. *M'Clean*, Mrs. *M'Clister*, Mrs. *O'Hale*, and Mrs. *Garland*. That he knew *Daniel M'Clean* a lessor, and understood that he was the son of a sister of *M'Neil*. That he knew *Thomas Garland*, the son of another sister of *M'Neil*; and that they claimed lands in this country, as heirs of *M'Neil*, before the witness left *Ireland*.

Francis Henry, a witness for the plaintiff, testified, that two adjoining patents of land in the county of *Otsego*, granted to *John M'Neil*, *Alexander Stewart* and others, are held and occupied under a title derived from the heirs of *Stewart*, and under a title derived from *Daniel M'Clean*, *Thomas Garland* and others, the reputed heirs of *John M'Neil*, who died in *Ballycastle* in *Ireland*.

The plaintiff having rested his cause, the judge decided, that there was not evidence sufficient to support the action, and directed a nonsuit to be entered, with liberty to the plaintiff to move to set it aside.

Brown, for the plaintiff.

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**Ford*, for the defendant.

SPENCER, Ch. J., delivered the opinion of the court. Mr. Justice *Le Blanc*, in *Higham v. Ridgeway*, (10 *East*, 120.) lays down the rule of evidence in cases of pedigree with perspicuity, and places it on a reasonable ground. He considers it as a departure from the strict rules of evidence, on account of the great difficulty of proving remote facts in the ordinary way, by living witnesses; "and on this ground," he says, "hearsay and reputation (which latter is the hearsay of those who may be supposed to have known the fact, handed down from one to another) have been admitted as evidence in cases of pedigree." "The tradition," said Lord *Eldon*, in *Whitelock and Baker*, (13 *Vesey*, 514.) "must be from persons having such a connection with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken."

In this case, the point was, whether the lessors of the plaintiff were the heirs of *John M'Neil*.

John M'Neil left this country before the revolution, and went to *Ireland*, where he soon after died; of these facts there is sufficient proof. Part of great lot No. 4. (and the premises are in that lot) is held under deeds from *John M'Neil*, who was the patentee. A part is held under *Luke Owens*, who claimed an undivided part of the lot under a deed from *Thomas Garland*. The witness (*Shall*) then proceeded to state that *Owens* had informed him that the mother of *Garland* was a sister of *M'Neil*, and that he had a number of sisters. It does not appear that *Owens* is dead, or that he knew, or professed to know, the facts he stated, from any connection or acquaintance with *M'Neil's* family, or his sisters. In that respect, *Owen's* declarations are of no weight, and to admit them as evidence would be contrary to every rule of evidence. *Alexander M'Kinnon* says, he was born in *Ballycastle* in *Ireland*, which he left about ten years ago. That he knew the lessor, *Daniel M'Clean*; that his father and mother are dead; that he has frequently heard of one *John M'Neil* in *Ballycastle*; that he understood from the physician who attended him, and others, that *he died before the witness's recollection, and that he has often seen the house where he died; that he understood that *John M'Neil* left no children; that he understood that he had four sisters, one of whom married *M'Clean*, one married *O'Hale*, and one married *Garland*; and he understood that *Daniel M'Clean* was the son of a sister of *John M'Neil*, &c. *Ezekiel M'Kinnon's* testimony is to the same purport.

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Now, the radical defect in all this evidence is, that the witnesses are not themselves connected with these families, know nothing personally of the facts to which they speak, and have not derived their information from such persons as had any connection or particular acquaintance with the family from which *John M'Neil* sprang. All that they state is loose hearsay from some unknown source. Since 1765, *John M'Neil* must have returned to *Ireland*; for in *September* of that year, the deed of partition was executed. His death, therefore, is not at so remote a period, but that in all probability there are living witnesses capable of informing us who his heirs were. At all events, the proof here is entirely inconclusive. The evidence falls short, in material respects, of giving any thing but unfounded hearsay, derived from we know not whom.

Motion denied.

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May, 1810.

JACKSON
v.
WHEAT.

JACKSON, *ex dem.* ROOSEVELT and others, *against*
WHEAT.

An *adverse* possession for twenty years, under claim or color of right, gives a title. It is not necessary, to constitute such adverse possession, that it [* 41]

should be taken under a good or rightful title. And if on the trial the defendant shows that he took possession, claiming under a deed, he is not bound to produce the deed, though called for by the plaintiff; but he may rely on his adverse possession.

A party claiming the benefit of the *proviso* in the statute of limitations, can only avail himself of a *disability* existing when his right of action first accrued.

THIS was an action of ejectment, to recover part of lot No. 21, in the second division of the *Minisink* patent, in the town of *Deerpark*. The cause was tried at the *Orange* circuit, on the 30th November, 1818, before Mr. Justice Van Ness, when a verdict was taken for the plaintiff, subject to the opinion of the court, on the following case :

The plaintiffs claimed title to the premises in question, *under the *Minisink* patent, dated 28th August, 1704. (*Vid.* vol. 16. p. 293.) On a division of the patent, lot 21, in the second division, became the separate property of *Lancaster Symmes*, one of the patentees, who died, leaving *L. S.* his heir at law, and who died before 1750, leaving three children, *Lancaster*, *Catharine* and *Elizabeth*. *Elizabeth* married *F.*, who died without issue ; she afterwards married *Peter Roosevelt*, by whom she had issue *Peter Roosevelt*, one of the lessors, and died before 1780. *Catharine Symmes*, before 1754, married *John Ogilvie*, by whom she had two children, *George* and *Mary*. Her husband died in 1774. *Mary O.*, in the summer of 1777, after the death of both her parents, married *Barent Roorback*, she then being fifteen years old, and continued under coverture until 1812, when her husband died. *George Ogilvie* died in April, 1797, leaving two daughters, *Eliza* and *Amelia*, one of whom married *Thomas Belden*, and the other *Jabez Comstock*, both lessors. At the request of the defendant, the plaintiff produced in evidence a deed, dated July 9, 1754, from *John Ogilvie* and *Catharine* his wife, to *Lambert Moore*, of all the real estate of *Catharine*, in trust that he should grant and re-convey the same to the said *John O.*, his heirs and assigns, and a deed from *L. M.* to *John O.*, his heirs and assigns, dated July 11, 1754, of the same estate.

John Ogilvie, by his last will, dated 22d November, 1774, after several personal bequests, devised all the residue of his estate, real and personal, to his two children, *George* and *Mary*, in fee, equally to be divided between them.

The defendant set up in his defence, a title by possession, and also that the lot occupied by him was not within the bounds of the *Minisink* patent.

John Gillet, a witness, testified, that the defendant had lived on the premises about forty years ; that *William Gillet*, uncle to the witness, was the first occupant of the next lot east in *Deerpark*. That the defendant bought of *W. G.* ; but the witness did not know whether he had a deed. That *W. G.* had a deed, and the witness supposed the defendant had one. *W. G.* claimed title under the **Minisink* patent, and purchased of *Henry Wisner*, one of the proprietors.

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The plaintiff called on the defendant to produce the deeds mentioned by the witness, which he refused to do, and they were not produced.

The defendant then offered to prove, that the premises were not contained within the bounds of the *Minisink* patent, which evidence, being objected to, was overruled by the judge.

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Billings, for the plaintiff, contended, that the right of Mrs. *Roorback* was saved by her coverture: That the defendant having shown that he claimed under the *Minisink* patent, was estopped to say that the premises were not within that patent. (1 *Johns. Cases*, 81.) That the point as to the location of the patent was decided in *Jackson, ex dem. Belden, v. Thomas*, (16 *Johns. Rep.* 293.) and the court will not grant a new trial merely for the sake of having that fact again proved. The plaintiff is entitled to recover one fourth of the premises, under the demise of Mrs. *Roorback*. (4 *Johns. Rep.* 311.)

Betts, contra. No objection was made at the trial, that there was not sufficient evidence of an adverse possession by *William Gillet*. The plaintiff's counsel merely called for the deeds, to prove that his possession commenced under color of title. The evidence clearly shows that the possession was adverse, and if it reached back to the life of *John Ogilvie*, it bars the rights of all the lessors. If it did not commence until after his death, in 1774, then the right of Mrs. *Roorback* is preserved, though the other lessors are barred.

A person who goes into possession of land, without right, or color of right, may, by lapse of time, and the neglect of him who has the right, acquire a perfect and indefeasible title. (3 *Cruise's Dig.* 368. tit. 29. ch. 1. s. 3.) In *Taylor v. Horde*, (1 *Burr.* 119.) *Lord Mansfield* says, "Twenty years adverse possession is a positive title to the defendant: It is not a bar to the action or remedy of the plaintiff only, but takes away the right of possession." (2 *Salk.* 421. **Lord Raym.* 741.) The same principle has been adopted by this court; (*Jackson, ex dem. Livingston, v. Schutt*, cited in *Jackson v. Lunn*, 3 *Johns. Cases*, 118. *Jackson v. Hazen*, 2 *Johns. Rep.* 22. *Smith v. Lorrillard*, 10 *Johns. Rep.* 350.) and by the courts of the other states. (13 *Mass. Rep.* 496. *Fanning v. Wilcox*, 3 *Day's Rep.* 258. *Ray v. Smith*, 2 *Bay's S. C. Rep.* 339. 1 *Munf. Rep.* 454. *Overton's Tennessee Reports*, 353.) Though the court has said that the possession must commence under claim or color of title, it is not meant that it should be under a title by deed. The fact of possession, and the *quo animo*, with which the defendant entered, determines the character of the possession. 9) *Johns. Rep.* 180. 13 *Johns. Rep.* 119. 16 *Johns. Rep.* 293.) If, then, a person enters on land, claiming and holding it as his own, the statute, after a continued possession of twenty years, gives him a title.

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He is not obliged to show that he entered under a title by deed. It is said, that the deed, if called for, must be produced, or its loss accounted for; but the person in possession may protect himself, by connecting his possession with that of *G.* (2 *Caines*, 183.)

Again, the defendant ought to have been allowed to show that the premises were not within the *Minisink* patent. If he sets up a distinct and independent title from that of *B.*, he is not estopped to say that the plaintiff derives no right from *B.* A defendant may always rely on his possession. *Jackson, ex dem. Belden, v. Thomas*, was decided on the particular case then before the court. It cannot preclude the party, in another cause, from showing that the patent was not correctly located.

Sudam, in reply. A mere occupation of land, without any paper title, or gift, or color of title, without such a lapse of years, or a descent cast, as will toll the right of entry, cannot give a title. The *English* cases suppose an entry under claim of title and a descent cast. The question of adverse possession has been much discussed in this court, and it is settled, that the entry of the defendant must be under color of title. There can be no *color of title*, unless there be a deed, or something equivalent to a deed, or a descent *cast. Here the evidence of the defendant showed that there had been a deed; and he ought to have produced it, or accounted for its non-production.

In *Jackson, ex dem. Young, v. Ellis*, (13 *Johns. Rep.* 118.) where *A.*, claiming title to land by descent, made a parol gift of it to *B.*, under which he entered, and *A.* afterwards conveyed the land to *B.*, it was held that the possession must be deemed to be taken by *B.* in his own right, or in behalf of *A.*, and in either point of view, the possession was the same. The court will not indulge presumption so far in favor of the defendant, as to consider 40 or 41 years to be 44 years.

Again; the defendant having showed that he claimed under the *Minisink* patent, he is concluded from setting up a title under another patent.

Per Curiam. 1. The possession of the defendant was, undoubtedly, adverse: it has been continued for a period of between 40 and 50 years, under a claim of title, by purchase from *Gillet*, who had a deed. It was not necessary to produce that deed, though called for by the plaintiff. Suppose the deed had been lost, or when produced was found to be defective, that could not have destroyed the effect of the defendant's possession. In *Smith v. Lorillard*, (10 *Johns. Rep.* 356.) *Kent*, Ch. J., said, "that after a continued possession for twenty years, under pretence or claim of right, the actual possession ripens into a right of possession which will toll an entry;" and in *Smith v. Burtis*, (9 *Johns. Rep.* 190.) *Spencer*, J., said, (*Van Ness*, J., and *Yates*, J., concurring,) that "it had never been con-

sidered necessary to constitute an adverse possession, that there should be a *rightful* title. Whenever this defence is set up, the idea of right is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests." And in *Jackson v. Ellis*, (13 *Johns. Rep.* 120.) the court said, that "it had been repeatedly ruled in this court, that an entry under *claim or color of title*, is sufficient to constitute an adverse holding. It is not necessary for this purpose, that the title under which such entry is made, should be a good and valid title." (2 *Caines*, 183.) (a)

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*2. The plaintiff claims to recover *one fourth* of the premises, on the demise of *M. Roorbach*, on the ground that she married *R.* in the summer of 1777, after the death of her father and mother. The defendant has been in possession above *forty* years, and it was *forty-one* years since *M. R.*'s marriage. If the defendant's possession commenced before her marriage, then, according to the opinion of the chancellor, in *Demarest v. Wynkoop*, (3 *Johns. Ch. Rep.* 129—138.) upon a review of all the cases, and which we consider as sound law, *Mrs. R.* can only avail herself of the disabilities existing when the right of action accrued; and the disability which then existed was *infancy*; for her right of a claim accrued when the defendant first took possession, and that was before her marriage. The case of *Doe v. Jesson*. (6 *East*, 80.) is in point. (b)

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It is, therefore, unnecessary to consider the question, whether the defendant ought not to have been permitted to prove that the premises in question were not within the bounds of the *Minisink* patent.

Judgment for the defendant.

(a) Vide post, page 355, *Jackson*, ex dem. *Vanderlyn, v. Newton and others*. *Jackson*, ex dem. *Young, v. Camp*, 1 *Cowen's Rep.* 605. *Jackson*, ex dem. *Gilliland, v. Woodruff*, 1 *Cowen's Rep.* 276. *Clap v. Bromaghun*, 9 *Cowen's Rep.* 530. *Jackson*, ex dem. *Baldwin, v. Leonard*, 9 *Cowen's Rep.* 653. *Jackson v. Hill*, 5 *Wendell's Rep.* 532. *Jackson v. French*, 3 *Wendell's Rep.* 337. *Whiteside v. Jackson*, 1 *Wendell's Rep.* 418.

(b) Vide *Jackson*, ex dem. *Swartwout, v. Johnson*, 5 *Cowen's Rep.* 74.

WELLS against BALDWIN.

THIS was an action of debt, for the penalty of a bond. The defendant cravedoyer, and set out the bond and condition. The bond, dated the 18th of May, 1817, was for the penal sum of 700 dollars, conditioned for the payment of 350

Where the plaintiff brought an action of debt on a bond executed by the defendant to the plaintiff, with a

condition to pay a certain sum of money, on a certain day; and the defendant pleaded, that the bond was given as collateral security for the performance of a certain contract or agreement made between the parties, &c., the plea was held bad; for where the condition of a bond is for the payment of money at a fixed day, evidence contradictory or varying such express condition is inadmissible. But if the bond is without a condition, and the plaintiff executes a separate instrument of defeasance, such defeasance may be pleaded to an action on the bond.

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dollars, as follows, to wit: 100 dollars on the 15th of *August* next; 200 dollars on the 1st of *November* next; and 50 dollar on the 1st of *January* next. The defendant then *pleaded, 1. *Non est factum*; 2. That the bond, together with a mortgage of the same date, on fifty acres of land, were given as collateral security for the performance, on the part of the defendant, of a certain contract or agreement entered into between the plaintiff and defendant, made at the same time and place, by which the plaintiff, on his part, promised and agreed, at his own expense, to clear twenty acres of land belonging to the defendant, in the manner therein stated, before the first day of *November* then next; and by that agreement it was provided and agreed, that in case any dispute or variance should arise between the parties relative to the performance of the said contract, it should be referred to arbitrators named, or any two of them, whose decision should be conclusive between the parties; that after the expiration of the time for completing the contract, a variance and dispute arose between the parties relative to the performance of the contract, and it was submitted to the arbitrators so named, who met and heard the parties, and two of them made and published an award, under their hands and seals, upon the matter in dispute; to wit, that the job (clearing the twenty acres of land) was not done according to the contract; and so the defendant averred, that the bond became discharged, inoperative, and of no effect, and prayed judgment, &c.

To this plea the plaintiff demurred, and the defendant joined in demurrer, which was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. If the facts set forth in the plea demurred to, really exist, I regret to say that a court of law is not competent to afford the defendant relief.

In the case of *Mease v. Mease*, (*Coup.* 47.) the action was debt on a bond conditioned for payment at a certain day; plea, that it was given as an indemnity to the plaintiff's testator against another bond, and plaintiff not damnified, and on demurrer to this plea, the question was, whether the agreement stated in the plea could be given in evidence against the express condition of the bond. It was argued for the *plaintiff, that no parol evidence could be received, to abate, or extend a bond or deed. Lord *Mansfield* pronounced the plea to be clearly bad, and judgment was given for the plaintiff. In *Thompson v. Ketchum*, (8 *Johns. Rep.* 192.) this court decided, that where a note had been given in *Jamaica*, promising to pay the plaintiff a sum of money, evidence was inadmissible to show an agreement, that the money was to be paid on the arrival of the parties in *New-York*; on the ground that it was against an established rule of law to vary the operation of

a writing by parol proof. To this point are, also, *Cro. Eliz.* 697. and *Meres and Ansel*, (3 *Wil. Rep.* 275.) and many other cases. Had the defendant entered into a bond without a condition, and taken from the plaintiff a defeasance in a separate instrument, referring to the bond, making it inoperative, if the plaintiff did not perform the agreement to clear the twenty acres of land in a particular way, and had he failed to do so, then the defeasance might have been pleaded; but here the bond is with a condition, that the defendant shall pay certain sums of money at fixed days, and it would be contradicting and impugning the bond, to admit proof, that instead of paying the money stipulated in the condition, the plaintiff was not to be paid, unless he cleared certain lands in a particular manner. It would be against the strong current of authority to admit such a defence.

Judgment for the plaintiff, with leave to the defendant to amend, on payment of costs.

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HASSAM
v.
GRIFFIN.

*HASSAM against GRIFFIN, Sheriff of Dutchess County. [* 48]

THIS was an action of debt, for the escape of *Benjamin Herrick*, who was in the custody of the defendant, as sheriff of Dutchess county, on a *ca. sa.* at the suit of the plaintiff. The cause was tried at the Dutchess circuit, on the 22d of April, 1818, before Mr. Justice *Van Ness*.

The defendant pleaded, 1. *Nil debet*; 2. That the escape was negligent, and that the defendant made fresh pursuit and recaption before suit brought; 3. A voluntary return of *Herrick* into custody before suit brought. To which pleas the plaintiff replied, taking issue. To the general issue, a notice was subjoined, according to the statute, that if *H.* had, at any time, escaped, it was without the knowledge or consent of the defendant, and that the said *H.*, after any such escape, and before bringing this suit, returned into the custody of the defendant, and so remained when the suit was commenced; and further, that on, or about the 24th of May, 1817, the defendant was served with a *habeas corpus ad testificandum*, duly issued and allowed by the chief justice, which required the defendant to have the said *Herrick*, on the 26th of May, before *John Wells*, Esq., a referee in the case of *John Brush*, at the suit of *John Smith*, at a reference to be held at the office of *J. W.* in Pine street, in the city of New-York, at 10 A. M. of that day, to testify, &c. That the defendant, with the consent of *Brush*, gave him a written deputation to execute the writ of *hab. corp. ad test.*, and make due return, &c., and that he made such return, &c. It appeared that *Herrick* and

A sheriff who has a defendant in custody on a *ca. sa.* is bound to obey a *habeas corpus ad testificandum*, according to the exigency of the writ; and if, in doing so, he takes the prisoner out of his county, and returns with him again, without unnecessary delay, it is not an escape; and while he so has the prisoner on the *habeas corpus*, he is not bound to keep him always in sight, or with the same strictness as before, and if the prisoner, of his own head, should go about, for a short time, on his own business, and out of view of the sheriff, it is not an escape

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Brush went to *New-York*, on *Saturday* the 24th of *May*, and appeared before the referee on the *Monday* following; that the reference was adjourned to *Wednesday*, and on *Thursday* they both returned to *Poughkeepsie*, and *H.* went again into the custody of the defendant; that while *Herrick* and *Brush* were in *New-York*, *H.* was seen at several times, at different places, on his own business, unaccompanied by *Brush*, but without *Brush's* *permission; and he considered himself in the charge, and under the direction, of *Brush*.

The writ in this cause was delivered to the coroner, on *Wednesday*, the 28th of *May*, between 10 and 11 o'clock in the forenoon.

A verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the above facts.

H. and *C. Ruggles*, for the plaintiff. (a) They cited the following cases: *Bronson v. Earl*, 17 *Johns. Rep.* 63. 2 *Wm. Bl.* 1045. 3 *Bl. Comm.* 415. 1 *Bos. & Pull.* 241. 3 *Comyn's Dig.* 601. *Escape, C.* 2 *Bac. Abr. Escape, B.* 2 *Saund.* 35. note. 5 *Johns. Rep.* 357. *Tydd's Pr.* 739. *Sellon's Pr.* 464. 1 *Str.* 433. 3 *Co. Litt.* 43, 44. *Moore*, 257. 5 *Burr.* 2812. 1 *Lord Raym.* 241. *Hard.* 476. *Cro. Car.* 14. 466. *Hob.* 202. 1 *Bos. & Pull.* 24.

Brush, contra, cited *Shower's Rep.* 298. 3 *Co. Litt.* 44. *Dalton's Sheriff*, 141.

SPENCER, Ch. J., delivered the opinion of the court. There is no doubt that after the defendant is taken in execution, if he is seen at large, without the liberties of the gaol, for ever so short a time, as well before as after the return of the writ, it is an escape in the sheriff. The sheriff, however, may protect himself from the consequences by a fresh pursuit and recaption, or by the voluntary return of the prisoner before action brought. The writ of *habeas corpus*, in this case, justified the defendant for conveying *Herrick* to *New-York*; and it is very evident that there was no unnecessary delay in bringing him back to *Poughkeepsie*. There is no weight in the suggestion that the *habeas corpus* was taken out collusively; but if it was, the sheriff was no party to the collusion. He was bound to obey the writ. (5 *Johns. Rep.* 357.) The only point to be decided is, whether permitting *Herrick* to be separated from *Brush*, the special deputy, without any permission on the part of the deputy, was an escape. The original object of the common law in subjecting debtors to close imprisonment on *execution was, that by duress of imprisonment, they might be coerced to pay their debts. They were to be kept in *arcta et salva custodia*. Under the statute of *Westminster*, 2 Ch. II. *Carceri mancipentur in ferris*, they

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(a) The reporter did not hear the argument.

might be kept in irons. Civilization and modern refinement, and a greater spirit of humanity have meliorated the law, and, with us, imprisonment is merely nominal. It exists, however, in some degree of rigor, where the unfortunate debtor is unable to give the requisite security for the liberties of the gaol.

But the question recurs, What kind of indulgence to a prisoner, in the sheriff's custody, on a *ca. sa.*, and who is directed to be brought before a court to testify under a *habeas corpus*, will subject the sheriff to an action for an escape? I am satisfied that the indulgence proved to have taken place in this case, does not constitute an escape.

The earliest case upon this subject is *Boyton's*. (3 *Coke's Rep.* 43.) It was resolved by the court, that there was a difference between the custody of one in execution, within the county where the common gaol is, and where the sheriff hath the custody of one in execution out of the county; and it was adjudged, that where the sheriff hath one in execution for a debt, and a *habeas corpus* issues to have the body in the *King's Bench*, at a certain day; by force of which writ, the sheriff, before the return of the writ, brings his body to an inn in *Smithfield*, toward *Westminster*, and the prisoner, of his own head, goes without any keeper, to *Southwark*, and the next morning comes again to the sheriff, to *Smithfield*, and at the return of the *habeas corpus*, the sheriff delivers his body in court, this was no escape; and they referred to *Charnock's* case, (31 *Eliz.*) and observed, that it stood with great reason; for the sheriff may more strongly guard his gaol, than every inn or other place through which he travels. *Bacon* (title *Escape*, B.) mentions this case as law. In the case of *More-dell v. the Marshal of the King's Bench*, (1 *Mod.* 116.) which was debt for the escape of one *Reynolds*, the defendant gave in evidence a *habeas corpus ad testificandum*, and it appeared that the prisoner went down too long beforehand, and staid too long after the assizes were done at *Wells*, and that he went back three-score miles beyond *Wells*, before he returned again to *London*. **Hale*, Chief Justice, said, that if a *habeas corpus* be granted to bring a person into court, and the sheriff lets him go into the country, it is an escape; that he ought not to carry him a roundabout way, for the accommodation of the party; and that if he did, it was an escape; that, by the evidence, the sheriff let him go back three-score miles, to which there could be no answer.

In Trinity term, 12 Ch. I. (*Cro. Car.* 466.) at a meeting of the justices and barons of the exchequer, *Brampton*, Ch. Justice, published, that the prisoners of the *King's Bench* and *Fleet* had petitioned the king, for avoiding the plague, that they who could give sufficient security to be true prisoners, and to return at the days prescribed, might go at large on *habeas corpus* for that time. All the justices and barons present having consulted, resolved that a *habeas corpus* was a good

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and legal writ, but under color thereof, the wardens and mai shal ought not to suffer prisoners to go at large; that it was an abuse of the writ, and an escape. In *Holdroid v. Liddel*, (1 *L. Ray*, 241.) *Powell*, Justice, said, if a *habeas corpus* is delivered to a sheriff, in *July*, to bring a man in execution to the common pleas next *Michaelmas term*, the sheriff may take a reasonable time, of which the court would judge; but he cannot bring him out of prison, and keep him out all the vacation; but *Treby*, Ch. Justice, said, he would not determine that point.

Dalton (*Sheriff*, 141.) lays down the law to be, that on a *habeas corpus*, if the prisoner, of his own head, goeth at large, and afterwards return to the sheriff, it has been adjudged not to be an escape.

It appears to me to be well settled, and I have met with no decision to the contrary, that if a sheriff, in yielding obedience to a *habeas corpus*, necessarily takes the prisoner out of his county, and returns with him when the exigency of the writ is answered, without unnecessary delay, that he is not guilty of an escape, if the prisoner of his own head should stroll about, and sometimes be out of the sheriff's view. Indeed, I am by no means satisfied, that if the sheriff should permit him to go out of his sight, whilst he has him under the *habeas corpus*, provided always there was no unreasonable delay in returning him to prison, that even such *an indulgence would be an escape. The *habeas corpus* relieves the prisoner, temporarily, from the duress of imprisonment under the execution. He is not then enduring the restraint created by the execution, with a view of coercing payment.

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If *Brush* had gone about with *Herrick*, on the business of the latter, whilst they were in *New-York*, I presume it would not have been contended that it would have been an escape; and it makes no difference whether *Brush* was present or not. *Boyton's* case, which has never been overruled, is, however, decisive; and the other cases all go in confirmation of it. The case from 1 *Mod. Rep.* 116. was decided on the principle, that the sheriff had let the prisoner go back *three-score* miles, which delayed improperly his return to gaol. We are of opinion that the defendant is entitled to judgment.

Judgment for the defendant.

NEW-YORK,
May, 1820.SECOR
v.
BELLE. A. & J. SECOR *against* BELL, Sheriff, &c.

DEBT against the defendant, as sheriff of the city and county of *New-York*, for the escape of *A. B.*, an attorney of this court, a prisoner in execution, at the suit of the plaintiffs.

On the 31st of *May*, 1819, a *ca. sa.* was issued on a judgment obtained in this court, by the plaintiffs against *A. B.*, an attorney, &c., for 302 dollars and 35 cents, on which he was arrested by the defendant, during the *sittings* held in *June*, before Mr. Justice *Van Ness*, upon which the defendant produced a writ of privilege allowed by *E. W. King*, one of the judges of the Mayor's Court of *New-York*. In obedience to this writ, the sheriff discharged *A. B.* from custody, and made return to the execution accordingly.

The questions submitted to the court on these facts were, whether the defendant is liable as for an escape; and, if so, whether the plaintiffs are entitled to recover interest and poundage on the sum directed to be levied on the *ca. sa.* against *A. B.*

SPENCER, Ch. J., delivered the opinion of the court. *Tidd* (p. 171.) lays down the rule to be, that the sheriff cannot take notice of the privilege of an attorney; nor is he bound to discharge him, even upon producing a writ of privilege, except where the arrest was by process issuing out of an inferior court; in which case, he says, their writs of privilege ought to be allowed to them, *instantly*; and that if an attorney or other officer of the K. B. be arrested, by process issuing out of the same court, he may move to be discharged on common bail.

By the 12th section of the statute concerning counsellors, attorneys, and solicitors, (1 *N. R. L.* 418.) every officer of the several courts of record are liable to arrest on *mesne* process, and to be held to bail as other persons. Attorneys, and other officers, were always subject to be taken in execution on a *ca. sa.* in this state. Our practice has been conformable to that of the court of K. B. They are relievable from arrest only on motion, and under the circumstances of the case. If an attorney be taken on a *ca. sa.* during his attendance in court, he having business to transact, the court, on an affidavit of the facts, and on motion, will discharge him from arrest; and this may, also, be done at the circuit or sittings.

The sheriff having no authority to discharge the attorney, on a writ of privilege, from the arrest on process out of this court, he is fixed with the debt, which will be the amount of the judgment, and the interest thereon at the time of the

Attorneys and other officers of the court, since the statute (1. *N. R. L.* 418. sess. 36. ch. 48.) are liable to arrest on *mesne* process and may be held to bail, like other persons; and they were always subject to be taken in execution on *ca. sa.*

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If an attorney or counsellor be taken on a *ca. sa.* during his attendance in court, having business to transact, he may be discharged on motion, on affidavit, &c. A judge at a circuit or sittings may also discharge him in like circumstances.

A sheriff cannot take notice of the privilege of an attorney, nor can he discharge him from custody on process out of this court, on his producing a writ of privilege; and if he does so, he is liable as for an escape, for the amount of the debt with interest to the time of the escape and poundage, if the plaintiff has paid any

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escape, but no interest since; and the poundage, if it has been paid to the sheriff, otherwise not. (a)

Judgment for the plaintiffs.

(a) It is the duty of the sheriff to serve process, notwithstanding the claim of privilege. 1 *Wendell's Rep.* 32. *Sperry v. Willard*.

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*Post, *Survivor, &c., against J. RILEY.*

Though a discharge under the insolvent act of this state, so far as it attempts to discharge the party from a contract, made previous to the passing of the act, is unconstitutional and void; yet the defendant may avail himself of it, to protect his person from imprisonment; but he must plead it specially for that purpose; and if he neglects to do so, and suffers a judgment to pass against him, his bail cannot be relieved, on the ground of the discharge, on motion.

THE plaintiff brought an action of covenant against *Riley*, for the non-payment of rent, on a lease dated *February 3, 1807*, due the 1st day of *May, 1812*. The defendant, on the 1st *May, 1812*, obtained his discharge, under the "act for the benefit of insolvent debtors and their creditors," passed *April 3, 1811*. (sess. 34. ch. 123.) The defendant was arrested on a *capias ad resp.* returnable in *May* term, 1817, and put in special bail. To the declaration filed in the cause, he pleaded, 1st, The general issue; 2d, His discharge under the act. On the 3d *March, 1819*, the plaintiffs demurred to the plea of the discharge, and the defendant joined in the demurrer; and in *May* term following, judgment was given for the plaintiff on the demurrer. The cause was tried in *November, 1819*, on the general issue joined, and a verdict found for the plaintiffs, on which a judgment was entered, and docketed in *January* last. A *fi. fa.* was issued to the sheriff of *New-York*, who returned *nulla bona*. A *ca. sa.* was thereupon issued, which was returned *non est inventus*. An action of debt, on their recognizance, was then brought against the bail, the process being returnable at this term.

T. A. Emmet, in behalf of the bail, now moved, that an *exoneretur* be entered on the bail-piece, on the ground that the defendant had been duly discharged under the insolvent act of 1811. He contended that, although the Supreme Court of the *United States*, in the case of *Sturges v. Crowninshield*, (4 *Wheat. Rep.* 122.) had decided that the insolvent act of 1811 was unconstitutional, so far as it discharged the party from the debt or contract; yet that case, as well as the decisions of this court, supported the discharge, so far as it liberated the person of the debtor from imprisonment and arrest. (*Mather v. Bush*, 16 *Johns. Rep.* 233. *Roosevelt v. Cebra*, 17 *Johns. Rep.* 108.) The bail, therefore, *who are responsible only in case the defendant is not surrendered within the time allowed by the rules of the court, ought to be relieved.

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J. T. Irving, contra, contended, that the discharge of the defendant, so far as it protected his person from arrest or im

prisonment, ought to have been specially pleaded; and that the bail could not avail themselves of it, on motion. That the discharge under the act of 1811 was pleaded as an absolute discharge of the debt, and being demurred to on that ground, judgment was given for the plaintiff. Independent of the *laches* of bail, in not seeing that the defendant had the plea amended, and pleading the discharge as to his *person*, the case is analogous to that of *Clarke v. Hoppe* and another. (3 *Taunt.* 46.) There the defendant having become bankrupt, and obtained his certificate, afterwards suffered judgment to be signed for want of a plea, and the plaintiff, after judgment and execution, proceeded against the bail; and the court of *C. B.* refused to relieve them on motion. (a)

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Per Curiam. The defendant, although his plea of discharge, so far as it went to his *absolute* discharge from the debt, was overruled, ought to have pleaded it specially, in discharge of his person from arrest and imprisonment, which is the proper mode of availing himself of it. The motion must be denied.

Motion denied.

(a) Vide *Mechanics' Bank v. Hazard*, 9 *Johns. Rep.* 392. *Olcot v. Lilly*, 4 *Johns. Rep.* 407.

*CARRIER against the P. D. & COMPANY OF THE
WESTERN BRANCH OF THE SCHOHARIE TURNPIKE
ROAD.

[* 56]

IN ERROR on *certiorari* to a Justice's Court. The *Turnpike Company* sued *Carrier*, before a justice, for five dollars of debt, and declared, for that whereas the defendant travelled with a horse in the town of *Sharon*, in the county of *Schoharie*, on the turnpike of the company, and turned off the road, to pass one of the gates on the road, and again entered on the said road, with intent to defraud the said company of the toll due to them, &c.; and also that the defendant, heretofore, travelled in the town of *Sharon*, on said turnpike, with a drove of cattle, and turned off, to pass one of the gates on the said road, and again entered the said road, with intent to defraud the said company, by avoiding the payment of the toll due to them, &c.

A turnpike act (sess. 25. ch. 113. s. 7.) provided that if any person with his team, cattle, &c. should, after travelling the road, turn off, to pass the gate or gates, on ground adjacent thereto, and again enter on said road, with intention to defraud the company, by avoiding the payment of toll, he shall forfeit the sum of five dollars, &c. The fact, that

It appeared that the defendant below had turned off the turnpike road in *Sharon*, at the house of *Luther Robinson*, and again entered on the turnpike, at the house of *Caleb Lamb*, in

the person, after turning off, travelled on an old public high way, makes no difference. The only question is, whether he turned off, *bona fide*, or with a view to avoid paying toll.

If he turns off at a place little more than half a mile from the gate, it is turning off on ground adjacent to the gate, within the meaning of the act.

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the same town, with a drove of 262 cattle: that he first entered the turnpike at its western extremity: that, in turning off at *Robinson's*, and again entering it at *Lamb's*, a turnpike gate, which stands a little more than half a mile from *Robinson's*, was avoided. The distance between *Robinson's* and *Lamb's* house, on the turnpike, is about four miles, and by turning off at *R.'s*, and travelling the old road where the defendant drove his cattle, the distance is 6 or 7 miles. After the defendant had thus gone round the gate, the toll-gatherer requested him to pay the toll, but he refused, saying that he would go round the gate when he pleased. It appeared that the old road had been used as a public highway above thirty years, and passed through a well-settled country; that loaded wagons and droves of cattle had frequently passed on that road: the turnpike was sometimes out of repair, but was then in good order; and between *Robinson's* and the gate there were several intervening *proprietors of the land. The justice gave judgment for the plaintiffs below, for five dollars and costs.

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SPENCER, Ch. J., delivered the opinion of the court. The act (3 *Webs. ed. Laws*, 137. sess. 25. ch. 113. s. 7.) provides, "that if any person, with his team, cattle, &c. shall, after travelling said road, turn off to pass the said gate or gates, on ground adjacent thereto, and again enter on the said road, with intention of defrauding said company, by avoiding the payment of the toll due by virtue of this act, such person shall forfeit the sum of five dollars, to be recovered," &c.

It can never enter into consideration, that in turning off the turnpike, after having travelled it, and again entering upon it, it was by travelling an old road. The act, in guarding against teams doing so, must have contemplated that they would necessarily travel on some road. The act intended to guard against the fraud of using the turnpike road, then turning off near a gate, and again entering upon the road, to avoid the toll; and where the facts of turning off the turnpike road and again entering it, concur, the question will be, whether it was done *bona fide*, or to evade the toll. Neither is it material that other persons have been in the habit of doing so. The defendant is to answer for himself, and must show that he had legitimate reasons for leaving the turnpike and again entering thereon, and thereby avoiding a toll-gate. It is material in this case, that the defendant travelled two miles farther than he would have done, had he not left the turnpike; and the circumstance that he had a large drove of cattle is, also, of weight. He inquired about the owner of a heifer, and, ostensibly, with a view to purchase her; but this deserves little notice, as it may have been a mere pretext, and it is not shown that he went round for that purpose. I see no reason to be dissatisfied with the correctness of the conclusion of the justice, from the facts, that the defendant went round the gate with a view to defraud the com-

pany of their toll. Had the old road been nearer or better, the conclusion, probably, would have been different.

The only remaining question is, whether the defendant turned off on ground *adjacent to the gate*. The word "adjacent," means lying close or near; and is used relatively *to the gates on the turnpike, which are ten miles apart. In the case of the *People v. Denslow*, (1 *Caines's Rep.* 180.) the court were called upon to decide whether a gate, erected *eight* chains and fifteen links distant from, was erected, as it ought to have been, "*near the dwelling-house of John Van Hoesen*;" and it was held to be so. I have no doubt that the road, little more than half a mile from the gate, ought to be considered as ground adjacent; and the court are, therefore, of opinion, that the judgment of the justice ought to be affirmed.

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v.

BURRELL.

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Judgment affirmed.

CROOKSHANK *against* BURRELL.

IN ERROR, on *certiorari* to a Justice's Court. *B.* declared against *C.*, before the justice, on a contract between him and the defendant, whereby it was agreed that *B.* should make the wood work of a wagon, which the defendant was to pay for in lambs, at one dollar a head. The plaintiff claimed 25 dollars. The agreement was proved; and that the plaintiff had made the wagon within the period limited. It was also proved that the defendant was to come for the wagon, and pay for it in lambs at one dollar a piece. The judgment was for 24 dollars and 94 cents, the plaintiff having remitted six cents; and, the objections were, 1st. that the contract was within the statute of frauds; 2d. that the plaintiff ought to have tendered the wagon.

The statute of frauds (10 *Sess. ch. 44. s. 15. 2 Rev. Stat. 136. § 3.*) applies to *executory* as well as other contracts; but it must distinctly appear, that the value of the goods sold was above 25 dollars.

A contract to deliver, at a future day, a thing not then existing, and yet to be made, is not within the statute, for it is

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work and labor a contract for only, not for the sale and purchase of goods.

As where the plaintiff contracted to make a wagon for the defendant by a certain day, and that he should come and pay for it, in lambs, at a certain price per head; this was held to be a contract for

SPENCER, Ch. J., delivered the opinion of the court. It no where appears that the value of the wagon or the price of it was ten pounds or upwards. The plaintiff *claimed to recover 25 dollars; but this does not denote the price of the wagon, and it is mere matter of form. But, admitting that the price agreed on was 25 dollars, still it would not be a case within the statute. (1 *N. R. L.* 75. *sec. 15. 2 Rev. Stat. 136. § 3.*) In *Bennet v. Hull*, (10 *Johns. Rep.* 364.) we decided, that the statute applied to *executory* as well as other contracts, and we recognized the cases of *Rondeau v. Wyatt*, (2 *H. Bl.* 63.) and *Cooper v. Elston*, (7 *Term Rep.* 14.) as containing a just and sound construction of the statute. In giving the opinions, in those cases, the judges referred to the case of *Towers v. Osborn*, (*Str.* 506.) with approbation. In that case, the defendant bespoke a chariot, and, after it was made for him, refused to take

work and labor, and so not within the statute

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it; and *Pratt*, Ch. J., ruled, that it was not a case within the statute. In *Clayton v. Andrews*, (4 Burr. 2101.) it was decided, that an agreement to deliver wheat, understood to be unthreshed, was not within the statute. The distinction taken by Lord *Loughborough* in *Rondeau v. Wyatt*, and by the judges, who gave opinions *seriatim*, in *Cooper v. Elston*, was between a contract for a thing existing *in solido*, and an agreement for a thing not yet made, to be delivered at a future day. The contract, in the latter case, they considered not to be a contract for the sale and purchase of goods; but a contract for work and labor merely. However refined this distinction may be, it is well settled, and it is now too late to question it.

It appears that the defendant was to come after the wagon, and that it was completed at the time agreed upon. It is necessarily to be inferred that, when he came for the wagon, he was to pay for it, in the mode agreed upon, and, of course, he was to drive his lambs to the plaintiff. We are of opinion that the judgment must be affirmed.

Judgment affirmed

[* 60] *JACKSON, *ex dem.* BOND and others, *against* ROOT.

In regard to
the proof of
the loss of an
instrument, so

EJECTMENT for part of lot No. 41, in *Pompey*, tried at the last *Onondaga* circuit, before Mr. Justice *Platt*. The plain-

as to excuse its non-production, there is a distinction between such papers as have ceased to be of any value or any evidence of title, and such as are *muniments* of title: As to the first, the slightest proof of loss, and even presumption of loss from lapse of time, is sufficient to entitle the party to give parol evidence of their contents; but as to the latter, the rule of evidence is more strict.

An award of the *Onondaga* commissioners was made in favor of the defendant, November 4, 1800, to which the plaintiff filed a *dissent*, according to the act, in February 18, 1801, and it appeared that the defendant was in actual possession in June, 1801. Held, that though the possession commenced after the award and dissent, but before the expiration of three years; yet the party filing his *dissent* is bound to take notice of the possession, and to bring his action against the party in possession, within the three years, and prosecute the same to effect, within three years, otherwise, the award is conclusive.

If the party in whose favor the award is made is out of possession, and his adversary in possession, the party out of possession must bring his action, and prosecute it to effect, within three years; and if he does so, his title is established, and the recovery is conclusive on the right. And it is the same, if the party dissenting should bring a suit against a tenant in possession, claiming under the party in whose favor the award was made, and a verdict after a trial as to right, is found for the defendant; for the intention of the legislature, in regard to these military lands, was to make a single trial as to the right, in an action of ejectment brought within the time limited, a conclusive bar to another suit; and if there is a trial on the merits, in a suit brought by either party, within the period prescribed, it is within the true meaning and intent of the act.

Where the words of a deed were, "For value received of G. and B., I hereby make over and confirm unto them and their heirs," &c., held, that these words were sufficient to raise a use, under the statute, and to convey the premises to the bargainee, in fee.

Where a soldier endorsed a conveyance on his discharge, in which he described the premises, as follows: "The six hundred acres of land due from the public, as a soldier in Colonel Lamb's regiment, of artillery;" when, in fact, he was not a soldier in Lamb's regiment, but in the first New-York regiment commanded by Van Schaick. Held, that the description was sufficient without the words "in Col. Lamb's regiment of artillery," which might, therefore, be regarded as surplusage.

A grantor who has given a deed with full covenants, is a competent witness for a defendant deriving title under him, but not as his immediate grantee, on being released by the defendant; for the release precludes the defendant from resorting to him or his immediate grantor, in case a verdict should be found for the plaintiff.

Where there were two subscribing witnesses to a paper, one of whom was proved to be dead, and the other living within the state, but too aged and infirm to attend the trial, proof of his hand-writing was held to be inadmissible; his examination taken under the order of the court, or under the statute, being better evidence.

tiff claimed under one *Christian Brandt*, a soldier in the first *New-York* regiment, and produced, 1. an exemplification of the patent, dated *July 8, 1790*, and passed the office of the secretary of state, *January 25, 1792*. 2. A deed from *Christian Brandt* to *Bernard Bond*, one of the lessors of the plaintiff, dated *September 6, 1782*, but admitted to have been executed some time in the spring of 1795, and antedated, with two subscribing witnesses, acknowledged *March 10, 1795*, before *Elihu C. Goodrich*, master in chancery, and again, on the 9th of *April, 1801*, before *Wm. P. Beers*, master in chancery; *Christian Brandt*, then present, being identified by *Gerrit G. Lansing*, on oath. 3. A deed from *Christian Brandt* to *Bernard Bond*, dated *April 18, 1795*, for the whole of lot No. 41, in *Pompey*, acknowledged and proved in the like manner. 4. A quit-claim deed *from *Bernard Bond* to *Ithuel Battle*, one of the lessors, dated *April 27, 1795*, for the same lot, duly acknowledged, recorded *June 26, 1795*. 5. A deed from *I. Battle* to *Nathaniel Griffin*, one of the lessors, dated *February 10, 1797*, for the same lot, excepting 110 acres lying in the north-west corner of the lot, and duly acknowledged.

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It appeared by the balloting book, in the secretary's office, that *Christian Brandt* belonged to *Tiebout's* company, in the first *New-York* regiment, and drew lot No. 41, in *Pompey*.

The plaintiff having rested his cause, the defendant offered in evidence the award of the *Onondaga* commissioners, dated *November 4, 1800*, awarding lot No. 41, in *Pompey*, two thirds thereof to *John Fisher*, and one third to *John E. Fisher*, and *Eleanor Clark*, wife of *James B. Clark*, and *Maria Clark*, wife of *Peter Clark*, their heirs and assigns, in fee. A witness for the defendant proved a contract made between the defendant and *James B. Clark* for the premises in question, dated *July 5, 1802*, which was produced; and the witness testified that he was a subscribing witness to its execution, at the time it bears date; that at the time this contract was made, he understood that there had been a contract between *James B. Clark* and *Jabez Cobb*, which he presumed was surrendered, at the time the contract with *Root* was executed. The plaintiff's counsel objected to the proof of the existence and destruction of the contract, being sufficient to entitle the defendant to give parol evidence of its contents, *James B. Clark* being then present. The judge decided that the proof was sufficient for the purpose, considering the length of time which had elapsed since the contract was given up.

E. Cobb, a witness for the defendant, testified that his father, *Jabez Cobb*, now deceased, some time in *September* or *October, 1800*, made a contract with *James B. Clark*, for the purchase of the 100 acres of land, which *S. Root*, the defendant, afterwards purchased of *J. B. Clark*. That it was a written contract which he saw, and which he understood was, afterwards, relinquished by mutual consent. In 1801, the witness went

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on the land, under his father's contract, and cleared four or five acres, which he sowed with *wheat in the fall of the year, and sold the crop to *S. Root*, when he purchased of *J. B. Clark*. He did not erect a house or other building on the land. Several persons, whom he named, were on other parts of the lot, claiming under *I. Battle* and *N. Griffin*, when the witness went on, and had made extensive improvements; but that no house was erected or other improvement made on the 100 acres on which the witness entered under the contract; and that his was the earliest improvement made on the 100 acres. That in 1801, he was served with a declaration, by one *Cook*, in an action of ejectment, by *James Jackson*, on the demise of *Nathaniel Griffin*. This declaration was offered in evidence, and was dated *August 15, 1801*. The defendant also gave in evidence a record of a judgment in the suit of *James Jackson, ex dem. Nathaniel Griffin, v. Elnathan Cobb*, in which the memorandum was of *October term, 1801*; the trial, *June 5, 1802*, and a verdict for the defendant, on which judgment was entered and docketed, *September 29, 1802*. The defendant also gave in evidence, a record of a judgment recovered in ejectment, the *11th August, 1802*, on the demise of *James B. Clark*, against *J. Crocker*, and which was tried, and a verdict found for the plaintiff, the *5th of June, 1802*; also, the record of a judgment in another suit, on the same demise, against *Elijah Howard* and *A. R. Mecker*, docketed *11th August, 1802*. *Howard* testified, that he had been in possession under *Griffin*, and after the recovery against him, purchased of *Clark*; and *Crocker*, who also entered under *Griffin*, abandoned his possession; and in the fall of 1802, in consequence of the verdicts recovered in favor of *Clark*, the whole lot was given up to *Clark* by all those who were in possession, and it has been since possessed under his title, and valuable improvements made on the land.

The plaintiff's counsel then produced a *dissent*, filed, according to the statute, *February 18, 1801*, by *I. Battle, Nathaniel Griffin, E. Howard* and *J. Crocker*, to the award of the *Onondaga* commissioners. This evidence was objected to on the part of the defendant, because the award, and the recoveries in the actions of ejectment above-mentioned, were *conclusive against the plaintiff. The judge overruled the objection, but reserved the question.

The defendant then offered in evidence the original discharge of *Christian Brandt*, as a private of the first *New-York* regiment, having served six years in the army of the *U. States*, signed by the commander in chief, and dated *June 8, 1783*. On this discharge was endorsed the following instrument: "For value received of *George, Bartholomew and John Fisher*, I hereby make over and confirm unto them, their heirs, executors and administrators, for ever, the six hundred acres of land due me from the public, as a soldier in *Col. Lamb's* regiment of artillery.

In witness whereof, I set my hand and seal, this 19th day of February, 1784. *Christian Brandt*, his X mark (L. S.) Test. *James Sickles—Ralph Hodge.*" This instrument was duly proved before *John Ray*, a master in chancery, by one of the subscribing witnesses, who endorsed a certificate of the acknowledgment and proof, dated 17th of September, 1791. The discharge and deed endorsed were filed in the office of the clerk of *Cayuga*, on the 1st of September, 1794.

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To this evidence the plaintiff's counsel objected, 1. Because the soldier not being identified before the master, the deed was not admissible in evidence. 2. Because the deed contained no sufficient words of conveyance. 3. Because it appeared from the balloting book in the office of the secretary of state, that *Christian Brandt* was a soldier in the first *New-York* regiment, (which was commanded by Col. *Van Schaick*), and the deed, if genuine, passed no title to lot No. 41, in *Pompey*, as it conveyed such lands only as *C. Brandt* was entitled to as a soldier in *Lamb's* regiment of artillery. These objections were overruled by the judge, but the questions reserved.

Gerrit G. Lansing, a witness for the plaintiff, proved that *Brandt* was a soldier in the third *New-York* regiment, under Col. *Gansevoort*; and, upon the consolidation of the regiments, belonged to the first, or *Van Schaick's* regiment, and always served in *Tiebout's* company, except when he occasionally did duty in the corps of artificers.

Christian Brandt was then offered as a witness, and objected to as incompetent; but releases from *I. Battle* and *N. *Griffin*, the other lessors, from all the covenants, &c. contained in the deeds above-mentioned, being produced, he was admitted. He testified, that he was a *German* by birth, and enlisted at *Albany*, as a soldier in the revolutionary army, in *Tiebout's* company, in *Gansevoort's* regiment, and, upon the consolidation of the regiments, was in *Van Schaick's* regiment, but in *Tiebout's* company, until the end of the war: that he received his discharge at *Snake Hill*, and then went to *Wallkill*, where he staid a fortnight; and then went to *Fishkill* to see his comrades, where he staid one night, and lost his discharge. That he returned to *Fishkill*, where he missed his discharge, and had not seen it since, until it was produced at the trial. That he went to *New-York* in June, 1784, and staid till September, working with different persons. That he then went into *Dutchess* county, and soon after married, and there resided, until about 14 or 15 years ago, he removed to *New Canaan*, where he has since lived. That he knew one of the *Fishers*, a baker, at *Fishkill Landing*. That in August, 1795, one *Isaac Smith* applied to him about his military land, when the witness informed him that he had none, having sold it to *Bernard Bond*. That *Smith* asked him for a quit-claim deed, and, by the urgent request of *Smith*, he executed a deed, which was not read to him, and which he acknowledged before *Gilbert Livingston*, at

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Poughkeepsie; the circumstances being minutely detailed by the witness. That he never, to his recollection or belief, ever signed any other instrument at any other place. That in the spring of 1795, *Bernard Bond* came to him at *Little Nine Partners*, and showed him a printed book, and said that *Bartholomew Fisher*, and the witness, were in that book, and that *Fisher* had got his discharge, and was going to claim his land, and asked the witness to sell it, who agreed to take forty dollars, and executed a quit-claim deed, on receiving 20 dollars in cash, and the residue in goods. That he was confident that he never sold his land before he sold it to *Bond*. Two witnesses, inhabitants of *New Canaan*, testified to the good character of *Brandt*, as a man of integrity and veracity. The defendant then produced a deed, dated *December 23, 1793*, from *Bartholomew Fisher* to *Robert Pettit*, *James Saidler*, and *James R. Smith*, filed in the office of the clerk of *Cayuga*, *the 10th of *August, 1794*, for the lot in question, and which had been duly proved before *James M. Hughes*, a master in chancery, and recorded in the office of the secretary of state, *December 28, 1793*; a deed from these grantees to *John Fisher*, dated *December 31, 1794*, for the lot in question; a deed from two of the children of *George Fisher*, deceased, to *James B. Clark*, who had married the other child; and a deed from *James B. Clark* and his wife, and *John Fisher* and his wife, to *Root*, the defendant, for 100 acres in lot No. 41, in *Pompey*, being the premises in question, dated 17th *April, 1815*, and recorded *January 11, 1818*.

John Fisher, one of the grantees, in the deed endorsed on *Brandt's* discharge, and a grantor in the deed to the defendant, was offered as a witness, and, being duly released by the defendant, was admitted and sworn. The witness stated, that he saw *C. Brandt* execute the deed endorsed on the back of his discharge; that it was executed at the store of *George Fisher*, *February 19, 1784*. *George Fisher* died in 1787, and *Bartholomew Fisher* in 1793. That in *June, 1795*, the witness first learned that there was an opposing claim to the lot in question, and he procured *Isaac Smith* to go to *C. Brandt* and obtain a quit-claim deed. The circumstances as to the mode of obtaining the deed were detailed substantially as related by *Brandt*. That *Smith*, who had no interest in the land, afterwards executed a quit-claim to the witness. The witness further testified, that after the deed was acknowledged by *Brandt* before *Livingston*, the witness made himself known to *B.* as *John Fisher*, and *B.* then fully admitted that he gave the deed to him and his brothers in 1784. That *B.* made no scruple about executing the other papers, and knew their contents.

The following writing, which the witness, *J. F.*, testified was in his hand-writing, and executed by *C. Brandt*, after being properly explained to him, was then offered in evidence: "Received in the town of *Clinton*, state of *New-York*, this thirty-
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first day of *August*, 1795, of *John Fisher*, four pounds, eight shillings, *New-York* currency, as per agreement with Mr. *Isaac Smith*; and I do hereby, also, acknowledge the receiving six pounds, *New-York* currency, of *George, Bartholomew*, and *John Fisher*, on the 19th of *February*, *1784, the value expressed in an instrument of writing, executed on that day, as consideration for my land which was granted me by the state of *New-York* and the *United States*. In witness whereof, I have hereunto set my hand, the day and year above-mentioned. *Christian Brandt*, his + mark. Witnesses present, *Benjamin de la Vergne*, *Timothy Bedel*." *J. F.*, the witness, testified, that *Benjamin de la Vergne*, the subscribing witness, resided in *Dutchess* county, was about eighty years old, and very infirm, and that, on being subpoenaed to attend the trial, he refused to attend, declaring that the journey would cause his death; and that *T. Bedel*, the other witness, was dead. The hand-writing of *De la Vergne*, the subscribing witness, was then proved. The plaintiff's counsel objected to the paper being read in evidence; but the judge allowed it to be read, subject to all exceptions. The following paper, which *J. Fisher* testified was in his hand-writing, and executed by *C. Brandt*, to whom it was properly explained at the time it was executed, was offered in evidence; the witness stating further, that he had inquired after *Young*, the subscribing witness, in order to subpoena him, and that he could not be found. The evidence was objected to; but admitted by the judge, subject to all exceptions: "Received, *Poughkeepsie*, *August* 21, 1795, of *John Fisher*, the sum of four pounds, eight shillings, *N. Y.* currency, in addition to six pounds, eight shillings, received of *George, Bartholomew*, and *John Fisher*, the 19th *February*, 1784, being the consideration mentioned as value in an instrument of writing executed to them on that day. *Christian Brandt*, his + mark. Witness, *Thomas Young*."

The judge directed the jury, that if they found the deed to *George, Bartholomew* and *John Fisher*, of the 19th of *February*, 1784, to be a genuine deed, executed by the soldier, they must find for the defendant; and that if they found that it was not a genuine deed, they must give a verdict for the plaintiff, advising them to find specially on that question. The jury found a verdict for the defendant, stating specially, that they found the deed of the 19th of *February*, 1784, to be a genuine deed, executed by the soldier who served, &c.

*A motion was made to set aside the verdict, and for a new trial, on the following grounds: 1. The non-production of the contract between *James B. Clark* and *Jabez Cobb* was not sufficiently accounted for, to authorize parol evidence of its contents.

2. The lessors of the plaintiff, being in actual possession at the time of the award made, and having filed their dissent in

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the time prescribed by the statute, were not bound to bring their action within three years.

3. The instrument on the back of *Brandt's* discharge does not contain any words of conveyance sufficient to pass a fee, or to constitute a deed of bargain and sale, as applicable to the subject matter.

4. That that instrument, if it does contain operative words of conveyance, does not convey lot No. 41. in *Pompey*.

5. That *John Fisher* was an incompetent witness.

6. That the paper purporting to be a receipt, dated the 31st of *August*, 1795, was not proved by competent evidence.

7. That the verdict is against the weight of evidence.

E. Griffin, for the plaintiff. 1. In order to excuse the non-production of an instrument, so as to let in parol evidence of its contents, it must be shown that the instrument was executed and existed, that every reasonable inquiry has been made, and the last person into whose hands it is traced, should be called to give some account of it. (*Phillips's Evid.* 347, 348. *Peake's Evid.* 99.) Nothing of this kind had been shown in the present case.

2. It appears, that the lessors of the plaintiff were in possession of the land at the time the award was made, and having filed their dissent within the time prescribed by the act, (1 *N. R. L.* 213. s. 3.) they were not obliged to bring their action within three years. The case of *Jackson, ex dem. Scott, v. Huntley*, (5 *Johns. Rep.* 59.) was mentioned at the trial, and may again be cited; but that was the case of a vacant possession, and the expressions of Mr. Justice *Yates* were not necessary to the decision of that case, and are, therefore, to be regarded as dicta only. The court will not be disposed to extend, by construction, the operation of an act, always regarded as extremely rigorous, and the constitutionality of which has been questioned. The lessors being in actual possession, the act (s. 7.) declares, that the award shall have no effect on their title.

3. The writing endorsed on the soldier's discharge is not sufficient to pass a fee. In *Jackson, ex dem. Hudson, v. Alexander*, (3 *Johns. Rep.* 484.) the words of the instrument were "make over and grant," and the court held, that the word *grant*, though usually applied to the conveyance of incorporeal hereditaments, was sufficient to pass the title. (*Shep. Touchst.* 227.) In the case of *Jackson, ex dem. Salisbury, v. Fish*, there were two instruments; the first contained the words "remise, release, and for ever quit-claim," and the other the words *release and assign*. The word *release* is technical, and will pass any interest in the lands which the releasor may have. (*Shep. Touchst.* 319.) Here, the words are, "make over and confirm." The words "make over" have no precise technical

import, and must be taken in their popular sense. The word "confirm" has no application, unless where there is a previous estate in possession. A confirmation makes a voidable estate sure, or increases a particular estate. (1 *Inst.* 295. b. 296. a. 4 *Cruise's Dig.* 152. *Deed*, tit. 32. ch. 8. s. 41. 50.) There must be a previous estate on which it is to operate. The object of the statute of *uses* was, 1st. where the title had, by a good and sufficient conveyance at the common law, passed out of the grantor, to vest the legal title in the person for whose benefit the grant was really intended; 2d. to dispense with the necessity of entry or livery of seisin, in case of a bargain and sale. (3 *Bl. Com.* 333. 1 *Cruise's Dig.* 392. 3 *Cruise*, 172.) If this instrument amounts to a conveyance, it must be as a bargain and sale. But it does not contain the proper words for such a conveyance.

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4. But if this instrument does contain sufficient words, it does not convey lot No. 41. in *Pompey*. The words describing the premises are, "six hundred acres of land due me as a soldier in *Lamb's* regiment of artillery." These must be regarded as words of description, or of limitation and restriction. If words of description, they are essential, and cannot be rejected. (7 *Johns. Rep.* 224.) But they are to be regarded as words of limitation; they do not convey all the lands he may be entitled to from the government of the state, or the *United States*, but only 600 acres due to him for his services in a particular regiment. It is in vain to say, that *Brandt* was not a soldier in *Lamb's* regiment. As well might it be contended, that where a person conveyed all his lands in *D.*, and he had none in *D.*, that, therefore, his land in *P.* would pass. (*Dyer's Rep.* 50. 87. 376.) The lands comprised within the words of description pass, and no other. (*Jackson, ex dem. Rogers, v. Clark*, 7 *Johns. Rep.* 217. 224.) If the description had been lot No. 41, to which he was entitled to, &c., perhaps the latter words of the description might have been rejected.

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5. *Fisher*, having given a deed with covenants, was not a competent witness. What *Fisher* swore to on this trial, in case of his death, may be given in evidence by the other tenants, for them, in suits which may be brought against them for the parts of the same lot in their possession. (*Phillips's Ev.* 199.)

6. The paper or receipt, dated August 31, 1795, was not proved by competent evidence. *De la Vergne*, the subscribing witness, being living, ought to have been produced. The rule of evidence, on this subject, is clear, positive, and well settled. (*Phillips's Ev.* 356, 357. *Peake's Ev.* 100. *Peake N. P. Rep.* 30.) None of the exceptions to this rule, which are precisely laid down, will reach this case. (*Phillips's Ev.* 362.)

Sudum, contra. 1. The evidence as to the loss of the contract

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between *Clark & Cobb*, was sufficient to account for its non-production, so as to authorize parol evidence of its contents. If the loss is established with reasonable certainty, it is enough. Where there appears to be no reason why the paper should be suppressed, and that it has been delivered up and canceled, the court will presume that it was destroyed. The doctrine on this subject has been fully discussed in the cases decided in this court. (*Jackson v. Lucet*, 2 *Caines's Rep.* 363. *Jackson v. Frier*, 16 *Johns. *Rep.* 193. 197. *Livingston v. Rogers*, 1 *Caines's Cases in Error*, 27.)

2. The lessors were bound to bring their action within three years after the award of the *Onondaga* commissioners. The preamble to the act to settle disputes concerning the titles to lands in *Onondaga*, (1 *N. R. L.* 213.) as well as its whole scope and provisions, shows that the intention of the legislature was to quiet the titles to this tract of country, and to put an end to litigation concerning them, after a certain period. The *seventh* section declares, that unless the party in whose favor the award is made, shall within three years after the award is made, commence a suit at law or in equity, to recover the land, &c., and prosecute the same with effect, he and his heirs shall be barred of all right, &c. The award would have been of no consequence to the defendant, unless a suit had been commenced; and *Clark* did bring two suits, and recovered verdicts, in 1802. The suits were prosecuted to effect, and judgments entered, on which executions issued; and those under whom the defendant claims were put in possession. The lessor, *Griffin*, brought his suit, and failed. But it is said that the lessor was in possession of part, and so, constructively, of the whole lot; but the statute speaks of an *actual*, as distinguished from a constructive, possession. *Clark*, by his suit in 1802, obtained possession of the whole lot, and has had possession ever since. The doctrine contended for, on the part of the plaintiff, would make the statute a dead letter. The limitation was short, and was intended to be so. The object of the act was to quiet that part of the country, and to put a speedy end to controversy. The lessors of the plaintiff so considered it, and brought their action within the time prescribed. There can be no other rational construction to the statute, so as to give it effect (*Bac. Abr. Stat. I.*) In the case of *Jackson, ex dem. Scott, v. Huntley*, (5 *Johns. Rep.* 59.) it was decided that there must be an *actual* possession of the land, by one of the parties, before the period of limitation expires, or the statute could not attach, and that it did not extend to a case of a *vacant* possession; the object of the statute being to secure to a party claiming adversely an opportunity to assert his title.

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*3. The instrument endorsed on the discharge of *B.* was a sufficient conveyance of all his interest. The words "value received," import a valuable consideration, which is sufficient

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to raise a use, under the statute. Before the statute of uses, the word *grant* would no more convey land than the word *confirm*. The word *confirm* is more operative than *grant*. No precise or technical words are required to raise a use. If the words amount to a present contract of bargain or sale, a trust is raised, on which the statute operates. (*Jackson v. Fish*, 10 *Johns. Rep.* 456.) The word *confirm* implies a previous estate or lease. The word *confirmavi* is equal to lease and release. (2 *Bl. Comm.* 226. *Noy's Maxims*, 141. 143. 1 *Inst.* 295. *Litt. sec.* 519. *Sheph. Touch.* 312, and note. *Gilb. Tenures*, 19. *Sheph. Touch.* 221.) It is equal to the words *dedi et concessi*, in every thing except as to warranty. It is manifest that *B.* intended to sell and convey all his right, title and interest in the lands. Though the words "make over" are not technical, yet they show, clearly and unequivocally, an intent to grant and convey all his estate; and the court will so construe the instrument as to give effect to that intent. Since the statute of uses, the court will presume a conveyance, where the words are such as, at common law, would convey a fee simple.

4. The instrument being endorsed on the discharge, and referring to it, both are to be taken together; and if there is any mistaken description in the deed, it must be set right by referring to the discharge, which shows that *B.* belonged to the first *New-York* regiment, from which he was honorably discharged at the close of the war.

Again; a circumstance in a description false or mistaken, will not vitiate the deed, if there is a sufficient description without it, to designate the thing granted. The words as to *Lamb's* regiment may be rejected as surplusage, and the remaining part of the description sufficiently ascertains the land intended to be conveyed. (*Jackson v. Clark*, 7 *Johns. Rep.* 217. 3 *Johns. Cases*, 388. 1 *Johns. Cases*, 399. 8 *Johns. Rep.* 394. 495.)

5. The objection as to the witness *Fisher*, goes to his credit, not to his competency; he having been released.

*6. Whether the soldier was sufficiently identified, was a matter of fact, fairly submitted to the jury.

7. As to the proof of the receipt; it was shown that *Bedel*, one of the subscribing witnesses, was dead; and the hand-writing of the other witness was also proved. In *Jackson, ex dem. Livingston, v. Burten*, (11 *Johns. Rep.* 64.) it was decided, that it was not necessary to call all the subscribing witnesses to a deed, but showing that one was dead, and proving his hand-writing, was sufficient, without any proof as to the other witness. (4 *Johns. Rep.* 461. 7 *Term Rep.* 266, n.)

But there is a material objection on the part of the defendant. We contend, that *Brandt* was not a competent witness. He had given a deed to *Bond*, with full covenants of seisin and warranty, and *Battle* and *Griffin* could not release him from those covenants. The covenant of seisin is *personal*. If

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the grantor is not seised, it is broken as soon as it is made, and being a *chose in action*, the assignee cannot bring an action. (*Greenby v. Wilcocks*, 2 *Johns. Rep.* 1. *Hamilton v. Wilson*, 2 *Johns. Rep.* 72.) (a) And whether the objection is raised before or after the release, can make no difference; for if it appears, in any stage of a cause, that a witness is interested, and incompetent, he must be rejected. (*Swift v. Dean*, 4 *Johns. Rep.* 523.)

Sill, in reply. The objection as to the competency of *Brandt* goes only to the point, that the verdict was against evidence. We admit, that the covenant of seisin was personal, and that *Battle* and *Griffin* could not release the covenants contained in the deed to *Bond*; but we contend that a recovery in this action of ejectment would be no evidence in an action brought on the covenant of seisin. A defendant may be ejected, without its affecting the question of seisin. Ejectment tries only the possessory right; much less can a failure to recover affect the covenant. The verdict, therefore, whether in favor of the plaintiff or defendant, was immaterial to this witness. Besides, *Bond* was a mere nominal lessor, and, on motion for that purpose, his name might have been struck out of the record. Then, as to the effect of the award; that the lessors of the plaintiff are concluded by it, seems almost too plain for argument. The only difficulty is, whether the party was in actual possession or not. That the lessor, *Griffin*, the party who dissented, was in actual possession, abundantly appears from the evidence in the case. Actual possession is put in contradistinction to a legal or constructive possession. It is an actual occupancy of a part, claiming title to the whole. In *Tomb, qui tam, &c. v. Sherwood*, (13 *Johns. Rep.* 289.) such a possession was considered an actual possession of the whole, so as to entitle a plaintiff, in an action under the statute to prevent champerty and maintenance, to recover the value of the whole lot.

SPENCER, Ch. J., delivered the opinion of the court. To show a possession prior to the defendant's, under the same title, the defendant was permitted to prove, that the premises had been possessed under a contract with one *Jabez Cobb*, which contract was presumed to have been given up, when another contract was made by *J. B. Clark* with the defendant. The first contract with *Cobb* was in September or October, 1800, and the second, for the same land, with the defendant, in July, 1802. It was shown, that in June, 1801, *Cobb* went, under the contract, upon the premises, part of lot No. 41. in *Pomfret*, and cleared four or five acres, sowed it with wheat, and set the crop to the defendant.

(a) Vide *Kingdon v. Battle*, 1 *M. & S. Rep.* 355. 4 *M. & S.* 53. 5 *Taunt.* 415. 15 *Johns. Rep.* 488. n

This evidence was objected to, because the contract was not produced, nor shown to be lost, though it was proved that it was relinquished by mutual consent.

The nature of the contract with *Cobb* is not shown; but it is certain that it was relinquished by both parties, as early as 1802; and I think there is a material distinction between papers and writings which cease to be of any use or value, or any evidence of title, and such as are the muniments of one's title. In the first case, the slightest proof of loss, and even presumption, from lapse of time, of a loss, ought to entitle the party to give evidence of the contents, whilst, in the other case, the proof should be more strict. The *presumption of fact is, where an agreement is at an end, and *functus officio*, that there exists scarcely any inducement to preserve it; and it is matter of every day experience, at the circuits, to prove the fact of a tenancy, without producing the lease; the tenancy is a fact independent of the lease, though it may be under a lease. I am of opinion, from the lapse of time in this case, connected with the fact that the agreement was surrendered up, that it was competent to prove, that *Cobb* entered and possessed the premises under *Clark*, without strict and rigid proof of the loss of the surrendered agreement. We have high authority for saying, that the rigor of the law has been relaxed, on the subject of proving the loss of papers. (*Livingston v. Rogers*, 1 *Caines's Cases in Error*, 28.)

The award of the *Onondaga* commissioners was given in evidence; and it appeared that, on the 4th of *November*, 1800, they awarded this lot, two thirds to *John Fisher*, and one third to *John E. Fisher*, *Eleanor* the wife of *James B. Clark*, and *Maria* the wife of *Peter Clark*, and their heirs, in fee.

The plaintiff gave in evidence two deeds from *Christian Brandt* to *Bernard Bond*, given in 1795; a deed from *Bond* to *Ithuel Battle*, in 1795, and a deed from *Battle* to *Nathaniel Griffin*, in 1797, for all the lot, except 110 acres on the north-west corner.

It appeared, that *Nathaniel Griffin*, on the 15th of *August*, 1801, commenced an ejectment against *Elnathan Cobb*, who was in possession of the premises under his father, *Jabez Cobb*, which cause was brought to trial on the 5th of *June*, 1802, when a verdict passed for the defendant. It also appeared that two judgments on verdicts were obtained, in ejectment suits brought by *James B. Clark*, in *August*, 1802, against *Job Crocker*, *Elijah Howard*, and *Archibald R. Maher*, all of whom were in possession under *Nathaniel Griffin*, and that in the fall of 1802, *James B. Clark* obtained possession of the whole lot.

A dissent was given in evidence by the plaintiff, filed regularly, on the 18th of *February*, 1801, by *Battle*, *Griffin*, *Howard* and *Crocker*, and the question arises, whether the *award,

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under these circumstances, was conclusive on the lessors of the plaintiff.

The facts relative to the possession of that part of the lot now in question, have already been stated. *Cobb* went into possession in *June*, 1801, cleared and sowed, that season, four or five acres, and was served with an ejectment, in which *Griffin* was lessor, in *August*, 1801.

The 3d section of the act (1 *N. R. L.* 213.) declares "the award, after the expiration of two years from the making thereof, binding and conclusive on all persons, except such as shall, within the said two years, dissent from the same, and give notice thereof to the said commissioners, or file the same in the office of the clerk of *Onondaga*, and shall, also, if not in the actual possession of such land, within three years after such award, commence a suit or suits, either at law or in equity, to recover the land, or to establish his right to the same, and shall prosecute such suit or suits to effect, in which case such award or determination shall not operate as a bar to such suit or suits; but if no such suit or suits are brought within the times aforesaid, and prosecuted to effect, then the said award or determination of the commissioners shall be final and conclusive." The 7th section of the act provides, "that if the party dissenting, in any of the cases aforesaid, shall be in the actual possession of the premises, then, and in every such case, the award or determination of the commissioners so dissented from, shall, as to the party so dissenting, be considered of no effect; and in every such case, unless the party in whose favor such award or determination shall be made, shall, within three years after such award is made, commence a suit, either at law or in equity, to recover the land, or to establish his right to the same, and shall prosecute such suit with effect, then such person in whose favor such award or determination is made, and his and her heirs, shall for ever be barred of all right, title and claim in and to the land concerning which such award or determination is made." It cannot, I think, admit of a doubt, that one of the parties is concluded by the award, and the proceedings which have taken place. The dissent by *Griffin* and others, was filed the 18th of *February*, 1801. *Cobb's* possession under *J. B. Clark*, commenced *in *June*, 1801. In such a case, was it necessary for those against whom the commissioners had decided, to bring their action within the three years after the award? We have decided, in *Jackson v. Huntley*, (5 *Johns. Rep.* 59.) that where there was no possession on the part of those in whose favor the commissioners awarded, within three years after the award, it was not a case in which the party dissenting would be under the necessity of bringing a suit; that it was the intention of the legislature to secure to the party claiming adversely to the award, an opportunity to assert his title; and that it was not the intention of the act to oblige the party to proceed as for a vacant possession, in which the

title would not come in question. And it was observed by the judge who gave the opinion in that case, that, by the 3d section of the act, the party in whose favor the award is given, or the party dissenting, must be in the actual possession of the premises awarded, at some period before the limitation expires, or the statute cannot attach. I cannot entertain a doubt, that the party against whom the award was made, in this case, was bound to take notice of such a possession as *Cobb's*. It was commenced and carried on with notoriety, within a few months after the award was made and dissent filed; and it was incumbent on those dissenting to proceed, at law or in equity, to establish their title, by actually instituting a suit, and proceeding in it to effect. It would be unreasonable, where the intention of the legislature is so manifest, to have the title to these military lots speedily and expeditiously settled, to hold, that the party dissenting need not bring a suit to establish his right, because the possession was not coeval with the award or dissent. The case of *Jackson v. Huntley* repels such an idea. But what appears to be decisive in this case is, that *Griffin* actually commenced an ejectment against *Elnathan Cobb*, who was in possession of the premises under his father, *Jabez Cobb*, in August, 1801, and that suit was decided against *Griffin*. He cannot, after this, pretend that he was ignorant of *Cobb's* possession, or that the suit was not brought under the limitations of the act. Had *Cobb's* possession commenced covertly, shortly before the expiration of the three years, and the party dissenting had thus *been deprived of an opportunity of asserting his right, the case would have been materially different. The consequence of the suit is, that it not having been prosecuted to effect, the award of the commissioners is final and conclusive against the party dissenting. There is, however, another view of the case, which appears to me equally decisive.

If the party dissenting in this case is to be deemed in the actual possession of the premises, and the award as to him was inoperative, so as not to conclude his rights; then the party in whose favor the award was made, was bound to prosecute a suit or suits to effect, within three years after the award. The object of the legislature, as has been before observed, was to settle the disputes as to these military lands, by a speedy and expeditious method, in consequence of the manifold frauds and forgeries which had taken place; and the provisions of the statute were designed, in each case, as a short statute of limitation. Thus, under the third section, the requisition that the party against whom the award is made, if not in the actual possession, shall commence a suit within three years after the award, to recover the land or establish his right, and shall prosecute such suit to effect, admits of no other construction than this, that a single trial of the title on the merits shall be decisive. So, too, under the 7th section, if the party in whose

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favor the award is made, is out of possession, and his adversary against whom it is made, is in possession, it is necessary that the party out of possession should bring his suit, and prosecute it to effect, that is, succeed in establishing his right, within three years from the time of making the award, or he will be barred; but if he succeeds, and a judgment passes for him, then, having an award in his favor, and having succeeded at law, the recovery would be conclusive upon the right. In the present case, *J. B. Clark* having, within the three years, instituted two suits in ejectment against persons holding under *Griffin & Battle*, his rights have been decided upon; and having prevailed, his title to those parts of the lot is conclusively established. *Clark* did not bring any suit with respect to the premises; he was saved the necessity of doing so, by *Griffin's* bringing a suit against *Cobb*, who held under *Clark*. Now it appears to me that this suit is within the *spirit, equity, and intent of the statute. It was a suit, within the three years, for the establishment of the title; and, in effect, it was the same thing, whether *Clark* brought the suit, or whether he defended it by his tenant. It was a decision upon the merits. The suit by *Griffin*, though not strictly required, necessarily superseded any suit by *Clark*. The latter had three years to bring his suit; but by obtaining possession, and especially after a suit against *Cobb*, eventuating in favor of *Clark's* title, the latter could bring no suit. I am decidedly of opinion that, although it is not within the words of the statute, it comes within its purview and meaning, and operates as a bar to any other suit by *Griffin*. In any other action than an ejectment, a single trial and decision of the right, is conclusive upon the parties and their privies. The legislature meant, with regard to the military lots, that a trial within the specified time, which should eventuate effectually, should also be a bar. That trial has been had, and it must be decisive.

The next question is, as to the effect of the instrument on the back of the soldier's discharge. For value received, he makes over and confirms unto *George, Bartholomew, and John Fisher*, and unto their heirs, &c. for ever, the 600 acres of land due him from the public, as a soldier in Col. *Lamb's* regiment of artillery, and affixes his hand and seal, the 19th of *February, 1784*. This instrument was duly filed 1st of *September, 1794*. The objections are: 1st. that the grantor was not identified; 2d. that there are no words of conveyance; 3d. that it appears by the balloting book, that *Christian Brandt* was a soldier in the first *New-York* regiment, (*Van Schaick's*) and, therefore, nothing passed, as the grantor had no lands as a soldier in *Lamb's* regiment.

I will consider the second objection first. It is a cardinal rule, in the construction of deeds, that the intention of the parties shall prevail, if by law it may. The conveyance from *Brandt* was operative as a bargain and sale; the consideration ex

pressed is "for value received;" and in *Jackson v. Alexander*, (3 *Johns. Rep.* 484.) the very point was adjudged, on words precisely like these, and that decision is the law of this court. In the same case it was decided, that in conveyances under the statute of uses, it is enough, if the *granting words are sufficient to raise a use, for the statute then performs the task of the ancient livery of seisin. But the question as to what words are sufficient to raise a use, was more fully considered in *Jackson v. Fisk and another*. (10 *Johns. Rep.* 456.) There the words of grant were, "I, C. C., have remised, released, and for ever quit-claimed;" and it was held that these words were sufficient to raise a trust or use, for the benefit of the bargainee; and that, by the statute, the use was transferred into possession; and it was also held, that the words "release and assign" had the same effect. It was there also decided, that no technical precise words were required to raise a use, and that if the words amount to a present contract of sale, or bargain, a trust is instantly raised, on which the statute operates. To the case there referred to, may be added *Doc v. Salkeld*, (Willes's *Rep.* 675.) and *Goodright v. Moss*, (Coup. 593.) These cases are decisive of the question. The grantor here, "for value received, makes over and confirms unto the grantees, their heirs, &c. for ever;" the intention is clear and manifest, and the words denote a present contract of sale.

The next point to be considered is, whether *Brandt's* interest in the lot to which he was entitled, passed by the grant, although he was not a soldier in *Lamb's* regiment. The words are, "the 600 acres of land due me from the public as a soldier in Col. *Lamb's* regiment of artillery." It has not been controverted, that there would have been a sufficient description, if no mention had been made of the regiment. In the case of *Jackson v. Alexander*, the description was, "my right and claim on the public for 600 acres of land." No objection was made, that the description was not sufficient, and there can be no doubt it was. The donation of the land had been solemnly promised by the legislature, to the privates of the regiment to which *Brandt* belonged. The lands were, therefore, due to him, and it could have meant only the lands thus promised and afterwards granted. The principles laid down in *Jackson v. Clark*, (7 *Johns. Rep.* 217.) (a) apply to this case. If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant. As *there was a devise of a house called the corner house in *Andover*, in the tenure of *B. & H.*, when it was in the tenure of *B. & N.*, it was held that the corner house in the tenure of *B. & N.* passed, the addition of the tenure being surplusage. But when the description includes several particulars, all of

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(a) Post, *Jackson v. Loomis*, 84.

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which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as agrees with the whole description. Now, we have seen that the grant of the 600 acres due the grantor from the public, would have been sufficient to pass the lot; the addition of the regiment was, therefore, surplusage, and may be rejected. This case is even stronger; the grant was upon the back of his discharge, and necessarily referred to it, for that was the evidence of his being a soldier, and of the corps in which he had served.

Was the grantor sufficiently identified? This point was fairly submitted to the jury, and I see nothing to warrant us in granting a new trial, if no improper evidence has been admitted. Two objections are made to the testimony; 1st. that *John Fisher* was an incompetent witness; and, 2d. that the receipt for the consideration of 4l. 8s. and the admission that 6l. had been paid on the 19th of *February*, 1784, which receipt purports to be given on the 1st of *August*, 1795, and to be witnessed by *Benjamin de la Vergne* and *Timothy Bedel*, was not proved by competent evidence.

There can be no objection to *Fisher's* competency; he was released by the defendant, and although he was not the defendant's immediate grantor, yet the release would operate *pro tanto*, and preclude the defendant from any resort to him, or to *Clark*. The objection, then, went only to his credit.

But the objection to the admission of the receipt, proved only by a witness, who swore to *Benjamin de la Vergne's* hand-writing, was well taken. *De la Vergne* was alive, and within the jurisdiction of the court, and, although very aged, and probably incapable of attending the trial, yet he does not appear to be incapable, from the state of his mind, of testifying. He should have been examined, either under an order of the court, or a judge, or under the statute, and then he might have been cross examined. The rule is inflexible, that evidence of the hand-writing of a witness is inadmissible, *when the witness is in a situation to be examined, for it is not the best evidence. It is impossible to say what weight the jury attached to the facts admitted in that paper; they were material facts, and so was the genuineness of the receipt itself, as its execution was entirely denied on the trial, by the positive evidence of *Brandt*. (a)

This would be a decisive ground for a new trial, was not the plaintiff concluded by the trial and judgment in 1802.

Motion for a new trial denied, with costs.

(a) Vide *Jackson*, ex dem. *Woodruff*, v. *Condy*, 9 *Cowen's Rep.* 140. *Jackson* v. *Gager*, 5 *Ibid.* 383.

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EJECTMENT to recover part of lot No. 50. in the second division of the *Cambridge* patent, tried at the *Washington* circuit, in 1819.

The plaintiff gave in evidence a mortgage, bearing date the 15th of *August*, 1810, executed by *James Wells*, to the lessor of the plaintiff, registered on the 21st of *August*, 1810, in which the premises were described as follows: "All that certain piece or parcel of land, lying and being in the town of *Cambridge*, in the county of *Washington*, and state of *New-York*, being part of lot No. 51. of the second division of a patent granted to *Isaac Sawyer* and others, in the town of *Cambridge* aforesaid, in the said county, and bounded as follows, to wit: Beginning at a stake and stones, standing on the south line of the said lot, nine chains and fifty-two links and a half westerly from a stake and stone standing near a marked pine tree; from thence running south eighty-eight degrees, and thirty minutes west, four chains eighty-one and a half links, to a stake and stones; thence north, one degree and thirty minutes east, eight chains, to a stake and stones; thence south eighty-eight *degrees, thirty minutes west, twenty chains to a stake and stones; thence north, one degree and thirty minutes west, nineteen chains to a stake and stones; thence eighty-eight degrees and thirty minutes east, twenty-four chains and eighty-one links and a half to a stake and stones; thence south one degree and thirty minutes east, twenty-seven chains to the place of beginning, containing fifty-one acres of land, be the same more or less." The mortgage was given to secure the payment of 500 dollars, with interest, in twelve months.

The plaintiff then gave in evidence a deed, dated the 14th of *August*, 1810, from *Sidney Wells* and *Solomon Wells*, to *James Wells*, for 104 acres of land in *Cambridge*, described as part of lots No. 5. and 50. of the second division of *Cambridge* patent. A deed produced by the defendant, pursuant to notice for that purpose, dated the 1st of *May*, 1812, executed by *Edmund Wells* and *James Wells*, to the defendant, by which the grantors, in consideration of 1675 dollars, conveyed to the defendant two lots or parcels of land, the first described as situate in *Cambridge*, and being part of lot No. 50. of the second division of the *Cambridge* patent, containing 16 acres more or less; and the second of which lots, or parcels, described as being part of lot No. 50. in the said patent, and bounded *verbatim* as the premises in the mortgage above-mentioned, from *James Wells* to the lessor of the plaintiff, are described, containing fifty-one acres of land, more or less; of which premises the defendant was proved to be in possession.

Where the premises in a deed were described as lot No. 51. in the second division of a patent, "bounded as follows: beginning at a stake and stones," &c., giving monuments, courses, and distances; and it was proved, that the grantor, at the time of the conveyance, owned lot No. 50. in the same patent and that the monuments, courses, and distances, exactly corresponded with

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those found on the land, and that unless this land was conveyed by the deed, it would be inoperative, and of no effect. *Held*, that the words "lot No. 51." might be rejected as surplusage, the description of the premises being sufficiently certain without those words. If there is a contradiction in a description, that part of it is to be taken which gives most permanence and certainty to the location.

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James Gillis, a surveyor, testified that, shortly before the trial, he found a lot in *Cambridge* patent, corresponding with the description of the premises in the mortgage from *James Wells* to the lessor of the plaintiff, as to courses and distances; that he had made an actual survey of the lot, and found the monuments, as mentioned in the mortgage at every corner of the lot except one, at the distances mentioned in the mortgage. That, on his return from the survey of the lot, he met the defendant, who asked why he did not let him know of the survey; saying, that the lot which the lessor claimed, was different from the one of which he had a deed.

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*All the evidence for the purpose of showing that the premises described in the mortgage were intended to be conveyed as part of lot number 50. in the *Cambridge* patent, was objected to by the defendant's counsel; but the objection was overruled by the judge, who charged the jury, that from the evidence, there could be no doubt that the mortgage covered the fifty-one acres of land, purchased by the defendant from *Edmund Wells* and *James Wells*; that the registry of the mortgage was legal notice to the defendant of the plaintiff's lien; that he consequently purchased subject to the mortgage; and that the money being due on the mortgage, the plaintiff was entitled to recover; the jury, accordingly, found a verdict for the plaintiff. It was agreed that either party might turn the case into a special verdict.

A motion was made to set aside the verdict and for a new trial.

Wendell, for the defendant, contended, that no estate passed by the mortgage, as the premises claimed at the trial were not comprehended by the description in the deed of mortgage. The plaintiff was bound to show that the premises composed part of lot No. 51, and that it corresponded with the metes and bounds given in the mortgage. There are numerous lots, containing equal quantities of land, the courses and distances of which precisely correspond, and they are to be distinguished by their numbers. If the number of the lot is rejected, there is nothing by which to locate it. (7 *Johns. Rep.* 221. *Sheph. Touch.* 247. 3 *Bl. Com.* 381.)

Again; the plaintiff proved no notice, actual or constructive, of the *lien* on the land. It ought to be clear and positive, not resting in conjecture. That lots are known and distinguished by their numbers appears from various acts of the legislature. (8 *Johns. Rep.* 141.)

Z. R. Shepherd, contra, insisted, that the number of the lot was not a necessary part of the description, if there is enough without it to ascertain the land conveyed. Now, the mortgage contains the whole description, the exact *courses, distances

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and monuments, except the mere number of the lot. (7 *Johns. Rep.* 223. 4 *Mass. Rep.* 196.) (a)

The registry of the mortgage was legal notice to subsequent purchasers, of the existence of the incumbrance.

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SPENCER, Ch. J., delivered the opinion of the court. The question is, whether the mis-description of the lot, in which the premises are situate, it being described as lot No. 51, when, in fact, it was lot No. 50, is fatal to the plaintiff's mortgage; or, in other words, whether the premises of which *Wells* was seized, and which he undoubtedly intended to mortgage, passed to the lessor. In *Jackson v. Clark*, (7 *Johns. Rep.* 223.) we had occasion to examine and decide upon the principles applicable to the descriptive parts of a deed. The opinion then expressed was this: "If there are certain particulars once sufficiently ascertained, which designate the thing intended to be granted, the addition of a circumstance, false or mistaken, will not frustrate the grant. But when the description of the estate intended to be conveyed includes several particulars, all of which are necessary to ascertain the estate to be conveyed, no estate will pass, except such as will agree to every part of the description;" and cases were referred to, illustrative of the rule. The governing consideration in all cases upon the construction of deeds, is, to give effect to the intention of the parties, if the words they employ will admit of it. In the case then under consideration, the premises were described, as "lot No. 1. of the smaller lots into which lot No. 3. of the subdivision of lot No. 10. in the 12th general allotment of the patent of *Kayaderoseros* is subdivided, beginning at a hemlock tree, marked No. 2 and 3, being the north-west corner of lot No. 2. of the said subdivision, and standing on the easterly bound of lot No. 9. of the said allotment," giving other monuments, such as stakes and heaps of stones. In point of fact, the lands intended to be conveyed were in lot No. 1. of the subdivision of lot No. 3. in the division of great lot No. 10. in the 21st allotment of the patent; and it appeared that there was a lot No. 10. in the 12th allotment of the patent, but that it had never been subdivided. We held that the plaintiff was entitled to recover, *on the ground that the premises were sufficiently described, without reference to the general allotment, and that it was the addition of a false or mistaken circumstance, which did not affect the grant; and we laid great stress upon the facts, that the courses and distances of the lot sued for, precisely agreed with those given by the deed, and that the marked hemlock tree, and the stakes and stones were found, as required by the courses and distances. The case of the executors of *Worthington v. Hylyer*, (4 *Tyng's Mass. Rep.* 196.) was referred to, as containing just

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and sound doctrines on this subject. In that case, the description was erroneous in several important particulars. The description was, "all that my farm of land in *W.* on which I now dwell, being lot No. 17. in the first division of lands there, containing one hundred acres, with my dwelling-house and barn thereon standing, bounding west on land of *J. C.*, northerly, by a pond, easterly by lot No. 18, and southerly by lot No. 19, having a highway through it." There was a lot, No. 17, bounded precisely as the description was; yet it was decided that as the deed specified the grantor's farm on which he then lived, with his dwelling-house and barn thereon, although the dwelling-house and barn were not on lot No. 17, that description was sufficient to ascertain the estate intended to be conveyed, it appearing that two other adjoining tracts, in all amounting to 300 acres, were the property, and in the occupation of the grantor, when he gave the mortgage. The court rejected the description of the number of the lot, because the description was sufficiently certain without it; and because, if it was considered as part of the description, the deed would be void; and that the lot was mentioned as descriptive of the farm, and not the farm as descriptive of the lot. In *Doe, ex dem. Connolly, v. Vernon & Vyse*, (5 *East*, 51.) all the cases are collected, and well commented on. In the present case there is sufficient certainty by which to ascertain the land granted, independently of the number of the lot. It is to be a piece or parcel of land, lying in the town of *Cambridge*, and county of *Washington*, beginning at a stake and stones, nine chains, fifty-two links and a half westerly from a stake and stones standing near a marked *pine tree, and thence running, &c. Now, the stake and stones, the marked pine tree, and the courses and distances, and stations given, are shown, in point of fact, to correspond exactly with the description in the deed. We have a right to presume, either that these monuments were erected by the parties prior to the conveyance, and with a view to it, or that they went on to the land, and ascertained them to be there; and that the premises were then surveyed out under the inspection of the parties. These monuments are part of the description, and a much more important part than the expressions in the deed, "being part of lot No. 51, in the second division of a patent granted to *Isaac Sawyer* and others." Indeed, I consider the number of the lot no more important than the fact asserted, that the patent was granted to *Isaac Sawyer* and others; and suppose that this part of the description was untrue, that it had been granted to *John Sawyer*, or to any other person, surely that mistake would not avoid the grant. It seems to me that no one can doubt the real intention of the parties, to have the premises in question included in the mortgage; and if we reject the number of the lot, the premises are fully described, by the facts, that *James Wells* was seised of these lands when he gave

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the mortgage; that the monuments referred to in the deed are found on this land; that the courses and distances from one monument to another, precisely agree with those called for by the deed; and that unless the deed conveys this land, it is inoperative and void. On the latter consideration, Lord *Hardwicke* laid great stress, in *Gascoign and others v. Barker*, (3 *Atk Rep.* 9.) There is another principle applicable to the case. Here is a flat contradiction in the description, and then we ought to take that which is most stable and certain. This lot may have obtained its number from reputation merely; and in point of certainty, the number holds no comparison with the monuments. If courses and distances are given to reach an object, and if they will not reach it, you must go to the object as the most certain. My opinion, therefore, is, that the premises in question passed, by the mortgage, to the lessor of the plaintiff; and, in the language of Chief Justice *Parsons*, the lot was mentioned as descriptive of the land *to be conveyed, and not the land as descriptive of the lot. The reference to the lot is mere description. It was a mistake; but there are other and more certain objects of description amply sufficient to ascertain the land granted.

If the premises passed by the mortgage, then the title of the mortgagee cannot yield to that of a subsequent purchaser. The rules of construction upon this deed must be the same, whether the mortgagor afterwards conveyed it or not. It is impossible to believe, that had the defendant resorted to the registry of mortgages, and there found a mortgage from *James Wells* to the lessor of the plaintiff, and had read the whole description, but that he must have known that it was for the very land he was purchasing; for who ever heard of a perfect similarity of description, as to monuments, courses, distances and quantity, without being struck with the conviction, that if the land were situated in the same town, were pretended to be owned by the same man, and lay in the same patent, that they were not two tracts, but one and the same? I am of opinion the plaintiff must have judgment, and that is the opinion of the court:

Judgment for the plaintiff.

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A hostile investment or blockade of the port of departure does not dissolve a contract of charter party, and the master or owner

[* 88] has a right to retain the goods until he can prosecute the voyage with safety, or the freighter tenders the whole freight, and demands the goods.

Where a contract of affreightment, or charter party, was executed by the plaintiff and defendant, under their seals, for the transportation of goods from a port in Virginia to Cadiz; and the parties, on the same day, (January 26th, 1813,) made an agreement on a separate paper, not under seal, referring to the charter party executed by them, and stipulating that the owners should have on board a *Sidmouth license* for the protection of the ship and cargo: Held, that these were several and distinct contracts, and the supplementary agreement being *illegal* and void, did not affect or vitiate the charter party, which remained valid, and binding: (a)

OGDEN against BARKER and others.

THIS was an action of *trover*, brought to recover the value of a cargo of flour laden on board the ship *Baltic Trader*, of *Alexandria*; tried before Mr. Justice Yates, at the New-York sittings, in April, 1819. The plaintiff gave in evidence, 1. A charter party, under seal, dated *New-York*, 21st of January, 1813, between the plaintiff and *Abraham Barker & Co.* as agents and in behalf of the defendants, being owners of the ship, by which the owners agreed to let to freight to the plaintiff, the ship *Baltic Trader*, for a voyage from *Alexandria* (*Virginia*) to *Cadiz*, for the purpose of transporting a cargo of flour, which the plaintiff agreed to lade on board the ship, and the defendants agreed to carry, at the freight of three dollars per barrel, with five per cent. *primage*, to be paid on delivery of the cargo at *Cadiz*. 2. A supplementary agreement or memorandum, not under seal, as follows: "The undersigned having this day executed a charter party for the *Baltic Trader*, on a voyage from *Alexandria* to *Cadiz*, it is hereby further declared and agreed, that the owners or freighters of the said vessel are to furnish and put on board a *Sidmouth license*, for the protection of the ship and cargo, and are to pay the extra costs of such quantity of half barrels as may be required by the captain for storage. The supercargo of the freighters is allowed a passage in the cabin, out and home, should the vessel return to the *United States*, free of expense, he finding his own stores." (Signed) "*Abraham Barker & Co. Abraham Ogden*. New-York, 1st mo. 26, 1813." The ship sailed from *Alexandria*, March 2d, 1813, with a cargo consisting of 5055 1-2 barrels of flour, for account of the plaintiff. The waters of the *Chesapeake* were then closely invested and blockaded by a *British* fleet, which prohibited all ingress and egress. The ship was stopped by the fleet, and ordered to return to *Alexandria*, and she accordingly returned. In July, she renewed the attempt to prosecute the voyage, when, after proceeding a few miles down the *Potomac*, she was stopped by Capt. Morris, of the *United States* navy, who made the following endorsement on her clearance: "In consequence of the ship *Baltic Trader* being laden with provisions, and the enemy's squadron now in the *Potomac*, which, with all the waters of the *Chesapeake*, being by them declared in a state of rigid blockade, I do hereby forbid the said *Baltic Trader* from proceeding below the U. S. frigate *Adams*, while the enemy are within the waters of the *Potomac*, unless she shall produce an order from the secretary of the navy to that effect. C. Morris, Capt. &c., July 23, 1813." On the third of August, the

(a) *Scott v. Libby*, 2 Johns. Rep. 336. *Lorillard v. Palmer*, 15 Johns. Rep. 14. Contra, see also *Stoughton v. Rappelle*, 3 Sug. & Rawle's Rep. 455.

master of the *Baltic Trader* went on board the *U. S.* frigate *Albatross* to obtain *permission to proceed, when the captain of the *Albatross* again endorsed her clearance, forbidding her, pursuant to a general order of the secretary of the navy, dated July 29th, 1813, from proceeding, while the enemy's force should be so disposed as to prevent a reasonable probability of her getting to sea, without falling into their possession. The order of the secretary of the navy, above referred to, was published in the newspapers. In the fall of the year 1813, the supercargo demanded the flour of the master of the *Baltic Trader*, which he refused to deliver without payment of the freight, pursuant to the written orders of the owners to him, to that effect. The supercargo offered to deposit with the witness, the agent of the owners, the amount of the freight, until a decision could be had as to the right to freight, provided the cargo was delivered; but the master persisted in his refusal to deliver it, without receiving the freight. In August, 1813, about 1000 barrels of flour were landed and stored, under the master's control, being then, as the witness believed, sour. The ship and the remaining flour on board, were captured in August, 1814, at *Alexandria*, by the *British*, and carried away by them. It was proved that the flour would be materially injured, by the heat, while remaining on board from February to August. The master of the *Baltic Trader* testified, that he had on board, a document called a *Sidmouth license*. The witness conversed with the supercargo, after the ship was ordered back, about being discharged; but the supercargo told him, that he must hold himself in readiness; and the ship was accordingly kept ready, with a full crew, until the cargo was demanded, which was in August, but the freight was not offered.

The case contained the correspondence between the parties on the subject, and the evidence as to the value of the flour, which it is unnecessary to state. A verdict was entered for the plaintiff, for the value of the cargo, estimating it at 3 dollars and 85 cents per barrel, and deducting the proceeds of what was sold at *Alexandria*, and also the amount of what was received from the captors for the proceeds of what was sold at *Bermuda*. It was agreed that the verdict should be subject to the opinion of the court on the *case made, with liberty to either party to turn the same into a special verdict.

Wells, for the plaintiff, contended, that this case was distinguishable from that of *Palmer v. Lorillard*, (16 *Johns. Rep.* 343.) That was an action of assumpsit brought on the bill of lading, and was in affirmance of the contract; and the *gravamen* was, that the property was lost through negligence. The court decided, that a hostile investment or blockade of the port of departure did not dissolve the contract of affreightment. In this case, it appears, that while the vessel was lying at *Alexandria*, on the 2d of August, 1813, the act of Congress pass-

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ed, prohibiting, under severe penalties, *American* vessels from sailing under *British* or *Sidmouth* licenses. Whatever opinion might have been entertained before the act, as to the legality of sailing with these licenses, there can be no doubt that, after this act was passed, it was unlawful to sail with such a license. This ship, having such a license on board, could not, therefore, have proceeded on her voyage without a violation of the law. If, before the act of Congress, it was illegal to proceed with such a license, then the contract of charter party could not be executed; the defendants had no right to insist on its performance. While the property was within the waters of the *United States*, there was, to both parties, a *locus penitentiae*. This is not one of those cases in which the maxim, *in pari delicto, potior est conditio possidentis*, will apply. This action is not brought to enforce the contract, but proceeds on the ground of its disaffirmance; and as if it had never existed. The property of the plaintiff is found in the possession of the defendants, which they refuse to deliver, on demand; they must justify that refusal; they cannot insist on the detention of the property, except on the ground of a contract which is unlawful. The act of Congress, if it is allowable so to speak, adds to the illegality of the contract, and renders the prosecution of the voyage still more unlawful. The supplementary clause, as to the license, though not in the body of the charter party, was executed on the same day, and being *in pari materia*, it is to be taken as part of the same contract. They form one entire contract between the parties; and the putting *a *Sidmouth* license on board was a material part of that contract. Neither party is at liberty to cut out the unsound part, and avail himself of the part which is sound. The canker remaining vitiates the whole.

The defendants here did not rest themselves on any equitable principle of the maritime law of *Europe*, and demand a rateable portion of the freight; but demanded the whole freight, as if the entire voyage had been completed. If not entitled to the entire freight, they cannot now put themselves on any other ground than that first taken by them, when they refused to deliver the cargo, and demand a reasonable compensation for their trouble and expense. When the defendants insisted on the payment of the whole freight, the plaintiff was not bound to tender any less sum, which he might suppose to be a reasonable compensation to the defendants, in order to entitle himself to demand his goods.

T. A. Emmet, contra. The case of *Palmer v. Lorillard*, having decided the point as to the effect of the blockade on the charter party, that question is at rest. But an attempt is made to distinguish this case, and it has been argued, that the charter party and supplementary agreement, form but one contract. But the chartry party is executed under the hands and

seals of the parties; and the memorandum of the agreement, as to the *Sidmouth* license, is made on a separate and distinct paper, without seal. They are, therefore, distinct and independent contracts.

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Sailing under licenses from an enemy was unlawful, before the act of Congress passed. They were unlawful by the common law, which avoids that part only of the contract which is unlawful, and preserves the rest. (*Hyslop v. Clark*, 14 *Johns. Rep.* 465. 1 *Mod.* 35. 2 *Wils.* 351. *Hob.* 14.)

The contract of charter party, then, remaining, the defendants were not bound to deliver the cargo, until they received the whole freight. The act of Congress did not alter the state of the parties, or operate on the original contract, so as to render it void.

D. B. Ogden, in reply. The performance of this contract, *by either party, would be illegal. This charter party is not properly an instrument under seal; it is not so executed as to give the plaintiff an action of covenant upon it. It is not under the *seals* of the several defendants. It is executed by *Abraham Barker*, for himself, and the other owners; it is the *seal*, then, of *Abraham Barker* alone. The two papers make but one contract.

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When the goods were demanded, the defendants claimed a *lien* on them, for the whole freight; they cannot now be permitted to vary their ground, and insist that the plaintiff ought to have tendered *half*.

Putting the contract between the parties entirely out of view, we have the facts, that the vessel had a *Sidmouth* license on board; and that after the act of Congress was passed prohibiting vessels from having such licenses, the master kept the license on board, and insisted on going to sea with it. The case is clearly distinguishable from that of *Palmer v. Lorillard*; for this contract was either illegal in its inception, or made so, afterwards, by the act of Congress.

SPENCER, Ch. J., delivered the opinion of the court. The case of *Palmer v. Lorillard*, (16 *Johns. Rep.* 356.) decided in the Court of Errors, entirely disposes of the question, as to the plaintiff's right to demand back the cargo, without the payment of freight, and the question does not arise, whether the plaintiff ought to have tendered full freight or less, because there has been no tender of any freight. The leading facts in this case are so entirely like those in *Palmer v. Lorillard*, that there is no distinguishing the two cases. It was there decided, that the blockade of the *Chesapeake* by the enemy's squadron, did not dissolve the contract of affreightment, but merely suspended its execution; and that the ship owners had a right to retain the goods until they could prosecute the voyage, or unless the plaintiff tendered the whole freight, to which the ship own

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ers would have been entitled on the completion of the voyage, or unless the contract was rescinded by mutual consent. To this decision we are bound to submit.

But it has been insisted, that the voyage from *Alexandria* *to *Cadiz*, under a *British* license, was illegal, and that the defendants, therefore, had no right to retain the cargo, in order to prosecute such voyage, and ought to have delivered it to the plaintiff upon his demand.

The parties entered into a charter party, under hand and seal, on the 21st of *January*, 1813, by which the defendants, as owners of the ship *Baltic Trader*, agreed to hire, and let to freight to the plaintiff, the said ship, for a voyage from *Alexandria* to *Cadiz*, to transport a cargo of flour, which the plaintiff agreed to lade, and the defendants to transport at a freight of three dollars per barrel, and five per cent. primage, to be paid on delivery at *Cadiz*. A supplementary agreement was entered into between the parties, not under seal, stating, among other things, that the parties had that day executed a charter party, and further agreeing, that the owners or freighters of the vessel were to furnish and put on board a *Sidmouth* license, for the protection of the ship and cargo. It is undoubtedly true, independently of the act of Congress of the 2d of *August*, 1813, that sailing under an enemy's license would render the voyage illegal, and the vessel and cargo confiscable. But the question is, whether the agreement to sail under an enemy's license, being distinct, and independent of the charter party, will attach upon that contract, and vitiate it. I am of the opinion, that the two contracts are severable; and that the last does not avoid the first. The contract of affreightment was full, complete, and perfect, under which the parties acquired reciprocal rights; it was consummated by sealing and delivery. Then comes the agreement, that the ship shall sail under an enemy's license, posterior in point of time, and by parol. It is admitted, that this agreement was void, because illegal.

Why should it infect and destroy a contract legally made, and under which rights had been acquired? It is in vain to say, that it was made on the same day with the charter party, and is in *pari materia*. It would be parcel of the contract, were it not wholly inefficacious. *Utile per inutile non vitiatur*. A vicious contract, which is, *ipso facto*, a nullity, cannot be incorporated with a prior lawful and valid one. If a valid contract should be made between *A.* and *B.*, that *A.* should *perform a journey on *B.*'s lawful business, and a subsequent one should be entered into on the same day, that on the journey, *A.* should commit a crime, the latter contract would be void. but it would not dissolve the first, or exonerate the parties for their liabilities under it. In *Hyslop v. Clark*, (14 *Johns. Rep.* 465.) Mr. Justice *Van Ness* takes the distinction between a contract made void by statute, and a contract void at the common law. In the first case, when a bond is void in part, as

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against the positive provisions of a statute, the whole bond is void. In the latter case, the common law makes void only that part where the fault is, and preserves the rest. Here the contract was made void at the common law, for it was before the act of Congress; and if the distinction be sound, and I incline to think it is, if the two contracts were in the same instrument, the agreement relative to the license would be void, and the charter party would remain uncontaminated by it. I place my opinion on the ground that the contracts were several, the one valid and the other void; and that the void agreement never attached to, or became parcel of, the contract of affreightment.

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Judgment for the defendant.

JACKSON, *ex dem.* STONE, *against* W. SCOTT.

EJECTMENT for two lots of land, in *Vernon*, county of *Oneida*, tried before Mr. Justice *Yates*, at the *Oneida* circuit, in *June*, 1819, when a verdict was taken for the plaintiff, subject to the opinion of the court, on the following case: *John Otis*, in 1811, was in possession of the premises in question, claiming title to them under a deed from *M. Wemp* and *O. Palmer*, and continued in possession until 1815, when he sold the premises, by a quit-claim deed, to *Joel Carson*, who immediately, and without entering into possession of the premises, sold and conveyed them, by a quit-claim deed, to *Elijah Scott*, who took possession, by virtue of the deed, and continued in possession until *August*, 1817, when the defendant, his son-in-law, went into possession under him. In *January* term, 1817, *E. Hotchkiss* recovered a judgment on a bond and warrant of attorney, against *Elijah Scott*, which was docketed *March* 22, 1817, and a stay of execution for one year was entered on the record. The sheriff of *Oneida*, by virtue of a *fi. fa.* issued on this judgment, the 16th of *May*, 1818, levied on the premises, and sold them to the lessor of the plaintiff, to whom he executed a deed, dated the 16th of *September*, 1818, for the consideration of 70 dollars. The defendant has continued in possession from the time he entered until the present time.

A person in the possession of land, under a contract for the purchase and sale of it, has an interest in the land which may be sold on execution.

The defendant, in such case, becomes quasi tenant to the purchaser, [* 95] and cannot object that he has no title.

The title to the premises was in the people of the state until in the spring of the year 1817, when they were sold, by the surveyor-general, at public auction, to *Elijah Scott*, the highest bidder, for about the sum of two thousand dollars: and the surveyor-general gave to him a certificate, in the usual form, promising to convey the premises to him, on his complying with the conditions of sale therein expressed. In *August*, 1817, *E. Scott* assigned this certificate to the defendant, who went into possession of the premises.

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Several witnesses were then examined to show, that this assignment from *E. Scott* was fraudulent as against creditors, but it is not necessary to state their testimony, as there seemed to be very little doubt on that point.

Talcot, for the plaintiff, contended, 1. That at the time the judgment was docketed, *E. Scott* had an interest in the premises, which might be sold under execution; and that he, or the defendant, could not set up a title in a third person to defeat that interest. *Possession* of land under a contract for the purchase of it, is an *interest in land*, within the meaning of the statute of frauds. (*Howard v. Easton*, 7 *Johns. Rep.* 205.) If so, it is an interest which may be sold on execution. A possessory interest in land may be sold. (*Jackson, ex dem. Malin, v. Garnsey*, 16 *Johns. Rep.* 189. 192.)

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2. Neither the party against whom the execution issued, nor the defendant, could set up an outstanding title in the people of the state. (*Jackson, ex dem. Klein, v. Graham*, 3 *Caines's Rep.* 188. *Jackson, e. d. Masten, v. Bush*, 10 *Johns. Rep.* 113. *Jackson, e. d. Seely, v. Morse*, 16 *Johns. Rep.* 197.) He is *quasi* a tenant to the purchaser under the sheriff's sale.

3. The transfer of the certificate of the surveyor-general from *E. S.* to the defendant was fraudulent and void, as against creditors; but whether it was so or not, the plaintiff stands in the same situation in regard to *E. S.*

Sill, contra, insisted, that *E. S.* had not such an interest in the land, as could be sold under the execution; and if so, the question as to the fraudulent transfer is immaterial. The statute (1 *N. R. L.* 500. sess. 36. c. 50.) subjects "*lands, tenements, and real estate*," to sale on execution. This was clearly not the *land* of *E. S.*; nor is it a *tenement*, which is an *inheritable* interest: (*Co. Litt.* 6. a. 20. b.) and if not inheritable, it is a mere chattel interest: nor is it real estate. In *Bogert v. Perry* (1 *Johns. Ch. Rep.* 52.) the chancellor held, that a judgment at law was not a *lien* on an equitable interest; as where a purchaser of land under a contract entered into possession, and afterwards assigned the contract to *S.*, who entered into possession, *S.* has not an interest which could be sold on execution, so as to pass an interest which a court of law would protect or enforce. (*Vredenburg v. Morris*, 1 *Johns. Cases*, 225. *Hewson v. Deygert*, 8 *Johns. Rep.* 333. *Jackson, ex dem. Norton, v. Willard*, 4 *Johns. Rep.* 41. *Kelly v. Beers*, 12 *Mass. Rep.* 387. 16 *Johns. Rep.* 200.) As to the case of *Jackson, e. d. Klein, v. Graham*, it appeared that the party once had a title to the land, and was in the actual possession of it, at the time of the sale. The possession of the party at the time of the sale is a material circumstance. (*Waters v. Stewart*, 1 *Caines's Cases in Error*, 47. 72.) If the defendant has no

estate on which a judgment can attach, what interest can be sold under the execution? As to the case of *Jackson v. Burk*, there was a deed from the judgment debtor to the defendant, his son, which was found to be fraudulent, so that no interest passed from the father. Where the judgment is voluntary, as by confession on a bond, it must be shown to *be for a just debt; otherwise it will not overthrow a sale, even though that sale be fraudulent. (*Rob. on Fraud. Conv.* 489, 490. *Holt's Rep.* 327.) In *Howard v. Eaton*, the question arose on the statute of frauds, the terms of which are broader and more comprehensive, than are to be found in the act concerning judgments and executions.

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Talcot, in reply, said, that if the defendant, in addition to his actual possession, had an *equitable interest*, it made the reason for its being sold on execution stronger. A judgment creditor is a *bona fide* creditor, and the case cited from *Holt* is not applicable. In the case of *Bogert v. Perry*, the question before the chancellor was, whether the party had such an interest, that he could compel a specific performance of the contract.

SPENCER. Ch. J., delivered the opinion of the court. There can be no doubt that the sale and transfer of the premises, by *Elijah Scott*, was fraudulent in regard to creditors, and therefore void: the counsel has not ventured to contend that the sale was not fraudulent, and the evidence so fully shows it, that the point may be dismissed.

The only question then is, whether, as *Elijah Scott* had only the possession of the premises, with a contract from the surveyor-general, entitling him to a conveyance, on the payment of certain sums of money, which yet remain due, he had such an interest as might be levied on and sold on execution. In the case of *Jackson v. Graham*, (3 *Caines's Rep.* 188.) the plaintiff's title was deduced under a judgment, execution, and sheriff's deed thereon to the lessor; the defendant in the ejectment being the person against whom the judgment was rendered and execution issued; and it was shown that, before the entry of the judgment, the defendant had been, and then was, in possession. The defendant offered to prove, that one *Day* was the real owner of the premises, and that the defendant had no interest in them. This evidence was rejected, and the plaintiff recovered. An application was made to set aside the verdict, and one ground taken was, that *Graham* was a mere tenant at will, and had no transferable interest, either by his own act or the operation *of law. The court denied the motion, and gave judgment for the plaintiff; saying, that the defendant under an execution became *quasi* tenant to the purchaser. We considered the purchaser entitled to all the right the defendant had in the premises, and to the possession as

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part of his right; and that this would be of no prejudice to the real owner. Whether *Elijah Scott* was seised or not of the premises, was not a subject of inquiry; he was seised, or had a chattel interest in the land, liable to be sold. We have decided, that a mere equitable interest cannot be sold on execution; but if connected with the possession of the land, the legal interest, of which the possession is evidence, may be sold. (7 *Johns. Rep.* 206.) The purchaser acquires all the debtor's legal rights; and possession is a legal right. It becomes a different question, whether a court of equity will enforce an equitable interest, which the debtor had in the land, at the instance of the purchaser. A court of law will not inquire what title the defendant, under such circumstances, has. He is precluded from making the objection, that he has no title.

Judgment for the plaintiff. (a)

(a) *Bogert v. Perry*, 17 *Johns. Rep.* 331. *Jackson*, ex dem. *Cary*, v. *Parker*, 9 *Cowen's Rep.* 85. *Jackson*, ex dem. *Ten Eyck*, v. *Walker*, 4 *Wendell's Rep.* 462.

JACKSON, ex dem. TUTTLE, against GRIDLEY.

A person who does not believe in the existence of a God, nor in a future state of rewards and

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punishments, cannot be a witness in a court of justice, under any circumstances.

Where it was proved that a person offered as a witness, had, within three months before the trial, often, deliberately and publicly declared his disbelief in the existence of a God, and a future state of

rewards and punishments, he cannot, on being called to be sworn and objected to, be admitted to deny those declarations, or to state his recantation of them, and of his present belief in a God, &c. But a witness may be restored to his competency, on giving satisfactory evidence of a change of mind, some time before the trial, so as to repel the presumption, arising from his former declarations of his infidelity, existing at the time he is called to be sworn.

Though infants may be examined as to their religious knowledge and belief, it is merely to test their capacity to give evidence, or their understanding of the nature and obligation of an oath.

But an adult of sound mind, when called as a witness, and objected to as an infidel, is not to be questioned as to his religious creed. (b)

had declared, that he would as lief be sworn on a spelling book as the Bible; and that he did not believe in the being of a God.

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A witness was then sworn, who testified, that he had heard *A. Gridley* deliberately declare, that he did not believe in a future state of rewards and punishments; that man was like the beasts; when he died, there was an end of him; and that he knew of no being superior to man; that these were his serious and public declarations, and that the witness had frequently heard him make them; and that within three months of the time of trial. *O. B.*, another witness, testified, that he had heard *A. Gridley* say, that he did not believe in the scriptures, and had as lief be sworn on a spelling book as the Bible; that he did not believe in the resurrection of the dead; that man was like the beasts; when he died, there was an end of him.

S. B., another witness, testified, that, within a week before the trial, he told *A. Gridley*, that his evidence would be spoiled on account of his declarations of infidelity; and *Gridley* replied, that he had formerly embraced the principles of the *Universalists*, and rather believed it was right.

The counsel for the defendant then stated, that the witness, *G.*, was now ready to declare his belief in a future state of rewards and punishments; and on being questioned, *Gridley* said, "that he did not know that he had any reason to doubt that there was an after-state of rewards and *punishments." The plaintiff still objected to his being sworn as a witness; but the judge overruled the objection, and directed the witness to be sworn, at the same time stating, that the witness having avowed his belief in a future state of rewards and punishments, and denying his alleged infidelity, it was a question of *credit* to be left to the jury. The witness lifted up his hand, instead of laying it on the book, and on being questioned, said that he had no scruples of conscience, and was about to be sworn on the book, when the plaintiff proposed to ask him whether he believed in the scriptures; but the judge ruled, that the question should not be asked, and the witness was sworn on the Bible; and testified, that three years ago, the lessor of the plaintiff confessed to him, that the first mortgage given to him by the defendant, was upon interest, at ten and a half per cent.; and that upon giving up that mortgage, the interest upon it was reckoned at that rate, and included in the mortgage given in evidence by the plaintiff. Another witness, a daughter of the defendant, also proved the admission of the lessor to the same effect. Several witnesses were sworn on the part of the plaintiff, to disprove the allegation of usury, and to impeach the credibility of *Amos Gridley*.

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The judge submitted the evidence as to the usury to the jury, adding, that in consequence of the evidence of the char-

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acter and standing of *A. Gridley*, he ought not to be believed; and that his statement was not deserving of any credit. The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial.

Talcot, for the plaintiff, contended, that *A. Gridley* was not a competent witness, and that his competency could not be restored by his declarations in court. The facts proved, in the first instance, clearly showed the incompetency of the witness, arising from his utter disbelief in the existence of a God and a future state. If allowed to be examined, afterwards, in court, for the purpose of restoring his competency, the plaintiff ought to have been allowed to ask him whether he believed in the scriptures, that he might object to his being sworn on them, if he declared his disbelief. *The question proposed to be put to him, and overruled by the judge, was merely to ascertain his religion, in order to determine in what mode he should be sworn, so as to bind his conscience. (*Omichund v. Barker*, 1 Atk. 21. *S. C. Willes' Rep.* 538. 1 Wils. 84. *Phillips's Law of Ev.* 16. 19.)

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In *Curtiss v. Strong*, in the Supreme Court of Errors in Connecticut, (4 *Day's Rep.* 51. 57.) it was decided, that a person "who does not believe in the obligation of an oath, and a future state of rewards and punishments, or an accountability after death for his conduct, is by law excluded from being a witness, for to such a person the law presumes no credit is to be given. Testimony is not to be received from any person, in a court of justice, but under the sanction of an oath. It would, therefore, be idle to administer an oath to a man who disregards its obligation. And every person who believes in the obligation of an oath, &c., whatever may be his religious creed, whether *Christian*, *Mahomedan* or *pagan*, or whether he disbelieves them all, is an admissible witness; and may testify in a court of justice, being sworn according to the form of the oath, which, according to his creed, he holds to be obligatory." (2 *Haywood's Rep.* 290.)

Sill, contra. The question proper to be put to a witness, is not as to his belief in the scriptures, but as to his belief in a future state of rewards and punishments. The cases cited, therefore, do not apply to the question here. If a subsequent recantation, made in open court, will not restore the competency of the witness, he never can be examined; for there is no time fixed, within which he is allowed to change his creed, or discard his infidelity. It is enough, if he satisfies the court that he has wholly changed his belief, and his declarations are the only evidence of that change. The case of *Curtiss v. Strong*, arose on the proof of a will, where the subscribing

witness must have been competent, and the witness himself was offered to be sworn; and Judge *Swift*, in his treatise on evidence, disapproves of that case.

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Again; the whole of the evidence is not set out in the case. If it had been stated, the court, if satisfied, that after *rejecting *Gridley's* evidence, there was still sufficient evidence to support the verdict, would not send the cause to another jury.

Talcot, in reply. Where there is a misdirection of the judge, and a motion for a new trial, on that ground, the court, if satisfied that the direction was immaterial, and that the verdict would have been the same without it, will not grant a new trial; but where illegal or improper evidence has been admitted, the court cannot determine what weight it may have had with the jury. In *Marquand v. Webb*, (16 *Johns. R. p.* 89.) the court said, that improper evidence ought not to be allowed to go to a jury, for the court cannot reject the evidence as immaterial.

It is said, that the doctrine for which the plaintiff contends, would amount to a perpetual exclusion of the witness. It is not meant to push it to that extent. All that is required is, that there should be reasonable and satisfactory evidence, that a person who has once disqualified himself, by such deliberate and public declarations of disbelief in all religion, and all the sanctions of an oath, should give reasonable and satisfactory evidence of his repentance and recantation. Another such an instance of utter depravity, it is believed, could not be found in this country; and the court should require the strongest and best evidence of the witness's sincere recantation of his abominable creed. Can a person be permitted to state facts not under oath, when he would not be believed if he was under oath? It would be absurd to credit a declaration of his recantation made under such circumstances; when he, if he had been sworn, would be wholly unworthy of credit. After he was admitted as competent, the judge told the jury that they ought not to believe him. A witness is to be sworn according to the religion he professes, without regard to his nation, or the place where the testimony is to be given. He must be sworn in such a manner as to affect his conscience by the sanction of an oath.

SPENCER, Ch. J., delivered the opinion of the court. It was proved, unanswerably, on the trial, that *Amos Gridley*, *a witness offered by the defendant, had, deliberately, within three months of the trial, declared his disbelief in a God, and a future state of rewards and punishments; that he had said, man was like a beast, and when he died, there was an end of him. Being interrogated as to his present belief, he said that he did not know that he had any reason to doubt there was an after-

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state of rewards and punishments. He was directed to be sworn, though objected to; and being about to be sworn on the gospels, was asked if he believed in the scriptures, and the question was overruled. If *Gridley* ought not to have been admitted as a witness, there ought to be a new trial, for his evidence was material, and might, and probably did, produce a verdict for the defendant.

By the law of *England*, which has been adopted in this state, it is fully and clearly settled, that *infidels who do not believe in a God, or if they do, do not think that he will either reward or punish them in the world to come, cannot be witnesses in any case, nor under any circumstances; because an oath cannot possibly be any tie or obligation upon them. Mahometans may be sworn on the Koran; Jews on the Pentateuch, and Gentoos and others, according to the ceremonies of their religion, whatever may be the form. It is appealing to God to witness what we say, and invoking punishment, if what we say be false. (Willer's Rep. 549. 1 Atk. 45. Str. 1104. Morgan's case, Leach's Cr. C. 64.)* On this subject we have, also, express legislative recognition of the common law. (1 N. R. L. 386.) Every person believing in the existence of a Supreme Being, and a future state of rewards and punishments, having conscientious scruples against taking an oath, shall be admitted to an affirmation.

But how is it to be ascertained whether a person offered as a witness disbelieves in the existence of a God, or in a state of future rewards and punishments? Mr. *Christian*, in a note to 3 Bl. Com. 369. says, "I have known a witness rejected and hissed out of court, who declared, that he doubted of the existence of a God and a future state; but I have since heard a learned judge declare, at *Nisi Prius*, that the judges had resolved not to permit adult witnesses to be interrogated respecting their belief of the Deity, and a future state. It is, (he adds,) probably, more conducive to the course of justice, that this should be presumed, till the contrary is proved; and the most religious witness may be scandalized by the imputation which the very question implies." In *Curtiss v. Strong*, (4 Day's Conn. Rep. 51.) it was decided, that the incompetency of the witness could be proved from his declarations out of court, concerning his opinions and principles; and it was also decided, that he could not be admitted to deny or explain in court the declarations imputed to him, as it would be incongruous to admit a man to his oath, for the purpose of ascertaining whether he had the necessary qualifications to be sworn. Judge *Swift* (*Treatise on Evidence*, 49, 50.) gives, in my opinion, an unanswerable argument against propounding any questions to a person offered as a witness, and before he is sworn, touching his religious creed. If an infidel has any conscience, or regard to truth, he would, if questioned, honestly avow

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his creed, and be rejected. If he had no conscience, or regard to truth, and his feelings inclined him to favor the party calling him, he would either deny the opinions imputed to him, or pretend to a sudden conviction, that he had been in an error, and that he now believed in a God, and a future state of rewards and punishments. But there is a still more decisive objection; it being proved by other and competent witnesses, that the witness offered had deliberately acknowledged himself to be an infidel, and disbelieved in a future state of rewards and punishments, the incompetency of the witness is established by proof. The declarations of the witness, not under oath, do not disprove these facts; for no fact, in a court of justice, can be established, or, when established, can be destroyed, but by evidence; and nothing can be evidence, unless delivered under the sanction of an oath. The assertions in a court of justice of no man, however high his rank, or exalted his character, can be received to make out a fact. I fully concur in the opinion expressed in *Curtiss v. Strong*, that it would be incongruous to admit a man to his oath, to ascertain whether an oath had any binding influence on his conscience. If he had no idea of the sanction which the appeal to Heaven, by taking an oath, creates, what is there to prevent his swearing *false in the preliminary inquiry? It may be, that in some instances, a witness has been interrogated in the way in which *Gridley* was, but we are without any adjudication in the *English* courts upon this point, and are at full liberty to settle the course of proceedings upon solid and rational principles; and it does appear to me, that upon principle, after it is proved that a witness offered is, at the time he is offered, an infidel, that he can neither be sworn to disprove the fact, nor be permitted, without oath, to make himself competent. I say an infidel at the time he is offered, for the proof ought to relate to avowals and opinions expressed by the witness within such time, as to induce the presumption that his infidelity still exists. If the declarations were made some time before, and it could be proved by external signs, that there had been a change of mind, such as a pious and devout attention to religious worship, and declarations in the belief of God, and a future state of rewards and punishments; such proof might reinstate the witness, and entitle him to be sworn. It will always be matter of proof addressed to the court; and they will take care to ascertain that the incapacitating infidelity does not exist, when the witness is admitted to be sworn.

It is the practice to question infants of tender years, as to their capacity to give evidence; and they are asked as to their religious knowledge, and whether they believe in a Supreme Being, and a future state of rewards and punishments. This inquiry is with the view of testing their capacities, and to ascertain whether they have sufficient understanding of the nature and obligations of an oath. The case of infants, supposed

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not to have strength of mind and intelligence sufficient to testify, is widely different from that of adults who have perverted minds, not acknowledging the sanction of an oath, and not being impressed with any dread, except of temporal punishments, should they swear falsely.

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The course pursued on this trial was to admit the witness on his declaration, *that he did not know that he had any reason to doubt that there was an after-state of rewards and punishments*, and to leave his credit to the jury; and the learned judge told the jury, that his statement ought to be disregarded *as deserving no credit. Now, it does appear to me, if the judge was authorized to say so, as I think he was, he ought not to have been admitted at all. It would be strange if the law admitted a man to be a witness, that the same law should declare he was not to be believed on account of the obliquity of his mind, and because he was incapable of being bound by any religious tie to speak the truth. The very fact that a person possesses such an awful creed, as renders him unworthy of credit, establishes that he should not be heard.

Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn concern between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere. They are bound to see that no man's rights are impaired or taken away, but through the medium of testimony entitled to belief; and no testimony is entitled to credit, unless delivered under the solemnity of an oath, which comes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man.

There must be a new trial, with costs to abide the event.

[* 107] *JACKSON, *ex dem.* SWAIN and others, *against* R. & J. RANSOM.

Where a deed, describing land conveyed, is illegible, or so as to leave it uncertain what is conveyed, the deed is so far inoperative.

But where a lot of land was described by a

EJECTMENT for part of small lot No. 174, in a tract of land in *Clinton* county, tried before the chief justice, on the 15th of *June*, 1819. The plaintiff gave in evidence a patent to *Udney Hay*, a lieutenant-colonel of the *Canada refugees*, for 500 acres of land, dated the 27th of *February*, 1790, described as follows: "All those two certain tracts of land, (being part of a large tract situate in the county of *Clinton*, set apart for the *Canadian* and *Nova Scotia* refugees,) known

and distinguished in a map and return of the said large tract, filed by the surveyor-general in the secretary's office, by lots No. 56, and No. 174, said lot No. 56 containing 420 acres, and lot No. 174 containing eighty acres of land; a deed from *Udney Hay* to *John Hoope*, dated the 30th of September, 1794, for "all that certain parcel or tract of land, granted to him as a *Canadian* refugee, containing 420 acres, marked and distinguished by lot No. 56; as, also, that other certain parcel or tract of land granted to him in like manner, containing eighty acres, and distinguished by the title of lot No. 174, (as the plaintiff's counsel read the deed, but which figures the defendant's counsel contended were 84,) which said two lots are one moiety of all the land he is entitled to as a *Canadian* refugee, &c. Also, a deed from *John Hoope* and *Mary* his wife, to *John Byrne*, for "all those certain tracts, pieces or parcels of land, situate, lying, and being in the county of ———, formerly granted to *Udney Hay*, a *Canadian* refugee, and late an officer in the service of the *United States*, known and distinguished by lot No. 56, containing 420 acres, and by lot No. 84, containing 80 acres, which said two lots of land are one moiety of all the lands the said *Udney* was entitled to as a *Canadian* refugee," &c., "which said two lots were conveyed by the said *Udney Hay* to the said *John Hoope*, by an indenture bearing date the 30th of September, 1794." *The defendant's counsel objected to the reading of the last-mentioned deed in evidence, on the ground that the small lot was described as No. 84, instead of 174; but the chief justice permitted the deed to be read, reserving the question. The plaintiff then proved, that *John Byrne* died about the year 1802, leaving two children, *Catharine* and *John*; that *John* died without issue, and *Catharine* married *James Calder*, one of the lessors; that the defendant was in possession of lot 174 when the declaration was served. The defendants' counsel move for a nonsuit; but the judge reserved the question of law, and the defendants gave in evidence a deed from *E. J. Ransom* of the defendants, dated the 30th of December, 1810, for lot No. 174, the premises in question, with full covenants of seisin and warranty, &c. The defendants also proved, that there was a lot No. 84, containing 80 acres, in the refugee tract.

The judge charged the jury, that if they believed that the deed from *Hay* to *Hoope*, was for lot 174, and not for lot 84, they ought to find a verdict for the plaintiff, subject to the opinion of the court on the points reserved. The jury found a verdict for the plaintiff, subject to the opinion of the court, on the points reserved.

Z. R. Shepherd, for the plaintiff.

Walworth, for the defendant.

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number in figures, which the plaintiff read 174, and the defendant 84; and from an examination of the whole deed, the jury and court were satisfied, that it was 174, it was held sufficiently certain.

Where the premises in a deed, being a lot of land, are described by a number of the lot, and also, as having been granted by letters patent to U., &c., and by him conveyed to J. H., the grantor, as by reference to

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that deed will more fully appear, and in the last deed the No. was 84, and in the one referred to 174, it was held, that omitting the number in the last deed, the premises were described with sufficient certainty to pass the lot mentioned in the deed referred to as No. 174.

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SPENCER, Ch. J., delivered the opinion of the court. This case presents two questions: 1st. Whether the deed from *Udney Hay* to *John Hoope*, conveyed lot 174, being parcel and part of lands granted to said *Hay*, by letters patent; and, 2d. Whether the deed from *Hoope* and wife to *John Byrne*, also conveyed to the latter the same lot. It is contended for the defendant, that the deed from *Hay* to *Hoope*, either conveyed lot No. 84, (and there is such a number in the tract,) or that the deed is so illegible as to render it altogether uncertain what lot was conveyed, or intended to be conveyed. The number of the lot is in figures; it was left to the jury to determine whether they were 84, or 174, and they pronounced them to be the latter. I agree to the *position, that if the writing be so illegible as not to be read, or to leave it in a state of uncertainty what is conveyed, so far the deed will be inoperative. I, however, think this not to be such a deed; and I am satisfied, by an examination of the whole deed, that the figures in question are 174. The figure 8 occurs in other parts of the deed, and it is wholly dissimilar to what is said to be 8 in this number; and I have no doubt the figures are 174. It appears that *Hay* was the patentee of that lot, but not of 84.

2d. The deed from *Hoope* and wife to *Byrne* conveys to the latter lot No. 84, and the premises in question have always been known as No. 174. The deed grants two lots, Nos. 56 and 84, and it describes them "as all those certain tracts, pieces, or parcels, or lots of land, situate, lying, and being in the county of——, formerly granted to *Udney Hay*, a *Canadian* refugee, and late an officer in the service of the *United States*, known and distinguished by lot No. 56, containing, &c., and by lot No. 84, containing 80 acres, and which said two lots of land are one moiety of all the lands the said *Udney Hay* was entitled to as a *Canadian* refugee, and by virtue of an act of the legislature of the state of *New-York*, entitled, &c., passed the 11th of *May*, 1784, which said two lots were conveyed by *Udney Hay* to the said *John Hoope*, by an indenture bearing date the 30th day of *September*, 1794, as, reference being thereunto had, will more fully appear. It appeared there was a lot No. 84 in that refugee tract, containing 80 acres; but it did not appear, that that lot had been granted to *Hay*, or that he had any other patent than the one for the two lots 56 and 174, both of which contained 500 acres; though he appears, by the act, to have been entitled to 1000 acres.

Had the numbers of the lots been wholly omitted, the description in the deed would have passed these lots, 56 and 174, for they are described as lots granted to *Hay*, as a *Canadian* refugee, by virtue of an act of the legislature particularly stated; and they are described as lots conveyed by *Hay* to *Hoope*, by a deed of a particular date, and reference is had to the deed, not only to prove the fact that a conveyance had been made, but of the lots intended to *be granted; and the

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reference was truly made, as appears by the deed given in evidence.

The *Bishop of Ely's case*, 4 E'iz. (*Shepherd's Touchstone*, 88.) contains the position, that if there be two clauses in a deed repugnant to each other, the first shall be received, and the last rejected, except there be some special reason to the contrary. This principle does not apply, for this description is all in one clause, and there are special reasons to the contrary; the reference to the grant to *Hay*, and the deed from him to *Hoope*; the insertion of 84 was clearly a mistake, and there is other and greater certainty in the description, than the reference to the number. In the case of *Jackson, ex dem. M Naughton, v. Loomis*,† I have had occasion to look into the cases, and I am of opinion, that the plaintiff is entitled to judgment.

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† Ante, p. 81.
See also p. 79,
Jackson v. Root.

Judgment for the plaintiff.

JACKSON, *ex dem.* BOWERS and others, against CRAFTS.

THIS was an action of ejectment, tried at the *Otsego* circuit, in *May*, 1819, before Mr. Justice *Yates*.

The declaration contained four counts: the first count was on the demise of the three lessors of the plaintiff, jointly; and the other counts were on the separate demise of each lessor.

*The defendant was in possession under title derived from *E'nathan Osborn*, who had executed a bond to *Bowers*, one of the lessors, dated the 28th of *April*, 1813, for 214 dollars, payable in five years, with interest; to secure the payment of which he executed a mortgage of the premises in question, being 100 acres of land, to *B. Bowers*, who assigned the bond and mortgage to *Reuben M Collum*, another lessor of the plaintiff, on the 6th of *January*, 1818. The principal and interest on the bond remaining due and unpaid, *Reuben M Collum*, by virtue of a power of sale contained in the mortgage, advertised the premises for sale, according to the statute; and pursuant

Where mortgaged premises were put up for sale at public auction, pursuant to advertisement and

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notice, given by virtue of a power of sale contained in the mortgage, and the assignee of the mortgage, acting as auctioneer, while the premises were up, on seeing the defendant, a purchaser under the mortgage, approaching the place of sale,

immediately knocked down the premises, for half the sum due on the mortgage to his brother, as the highest bidder, so as to prevent competition; Held, that the sale was fraudulent and void, and that the purchaser, to whom a deed had been executed, acquired no title under it.

The assignee of a bond and mortgage, having put the bond and mortgage into the hands of his attorney for foreclosure, afterwards told the attorney not to receive the money due, if it was tendered, nor do any thing farther about it, as he would attend to the business himself; proceedings for a sale under the power contained in the mortgage, having been commenced, a purchaser under the mortgage, on the day before the sale at auction was to take place, tendered the principal and interest due, and costs of the proceedings to the attorney, in whose hands the bond and mortgage then were, who refused to receive the money, assigning the instructions of his client as a reason for his refusal; Held, that this was a good tender to the principal.

If a legal tender is made of the money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage, though the debt remains. (u)

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to the notice, the premises were sold at public auction, at the house of *Joseph Mann*, in *Cooperstown*, on the 18th of *August*, 1818, to *David M'Collum*, the other lessor, as the highest bidder, for two hundred and thirty-two dollars, and *Reuben M'Collum*, on the same day, executed a deed to *David M'Collum*, for the premises in question, pursuant to such sale. Two witnesses for the plaintiff testified, that *Robert M'Collum* acted as auctioneer at the sale; that there were several bids, but that of *David M'Collum* was the highest; that while *Robert M'Collum* was crying the premises for sale, and after they had been up for some time, the defendant appeared in the street, and was approaching the place of sale, from which he was not far distant, when the premises were struck off; that there was some precipitation in striking off the premises, after the defendant appeared; that (as the witnesses thought) *Robert M'Collum* must have seen the defendant approaching, and it was publicly mentioned in the hearing of *Robert M'Collum*, that the defendant was coming; and the premises were then immediately struck off to his brother, *David M'Collum*.

The defendant gave in evidence a deed dated the 26th of *December*, 1814, for 50 acres, part of the premises, from *Elnathan Osborn* to *Elias Osborn*, who conveyed the same to the defendant, by deed dated the 31st of *July*, 1818; also a deed from the sheriff of *Otsego* to the defendant, dated the 24th of *May*, 1819, for the whole lot, sold on an execution against *Elnathan Osborn*, and under which the defendant took possession of the premises. It was, also, *proved, that the bond and mortgage had been left with an attorney, *J. Starkweather*, for foreclosure; that on the 17th of *August*, 1818, the defendant came to the attorney, and tendered to him the sum of 338 dollars and 13 cents, in gold and silver; that the amount of principal and interest due on the mortgage, together with the costs of advertising the sale under the mortgage, as stated by the attorney, was 337 dollars and 17 cents; but the attorney refused to accept the money so tendered, saying that he had been instructed by *R. M'Collum*, that in case a tender should be made, not to receive the money, as he, *Robert M'Collum*, had determined not to take it, but would go on and sell, at all events. The attorney admitted, that the amount of the sum tendered was sufficient. The defendant then deposited the money with the witness, who has ever since been ready to pay it over to *M'Collum*. The witness further stated, that *David M'Collum* told him that he knew that the money had been tendered, before he purchased. The attorney, who was sworn as a witness, confirmed the evidence of the other witness as to the tender; he said that *M'Collum* had forbid him to receive, or do any thing more about it, for that he, *M'Collum*, would attend to the business himself; and that he informed *David M'Collum*, on the day of the sale, of the tender having been made; but whether was it before or after the sale, the witness

did not recollect. He did not communicate it to *Robert M'Collum* until after the sale: That the bond and mortgage were in his possession when the tender was made.

A verdict was found for the plaintiff, subject to the opinion of the court on the above case, which was submitted to the court, without argument.

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WOODWORTH, J., delivered the opinion of the court. The mortgage having been assigned by *Bowers*, before the commencement of the action, the plaintiff cannot succeed, unless he makes out a subsisting title in one, or both of the other lessors. It is contended on the part of the plaintiff, that the sale and conveyance of the mortgaged premises to *David M'Collum*, vested in him the legal estate. To support this, it must be shown, that the sale was "*regular, fair, *and with good faith,*" according to the requisitions of the statute; if it was not, the purchaser acquired no title. *Reuben M'Collum*, the assignee of the mortgage, acted as auctioneer; previous to the sale, he directed his attorney not to receive payment of the money due.

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The bond and mortgage were, however, left in the attorney's hands. From the subsequent conduct of *M'Collum*, it may be inferred, that he expected a tender would be made, and being determined to sell, for that cause instructed his attorney not to receive the money. The circumstances which took place at the sale cannot be reconciled with fairness and good faith. The defendant, who had an interest in the premises, was approaching towards the place where the auction was held, and was seen by *Reuben M'Collum*; he was requested to wait until he came, but he did not, and immediately struck down the premises to his brother *David*, (who knew that the money had been tendered,) for two hundred dollars, one third less than the amount due. It is manifest this was done to prevent the bidding of *Crafts*, and to get rid of competition. The proceeding was unfair and fraudulent. The sale must be deemed to have been made to *David M'Collum*, for the benefit of *Reuben*; the motive for such precipitation is apparent; the contemplated speculation might have been defeated had there been a moment's delay. To sanction such proceedings would be subversive of justice, as well as a clear violation of the statute, under which the sale was made; and, consequently, no title was acquired to support the demise from *David M'Collum*. The title of *Reuben M'Collum* remains to be considered. The first question is, whether the tender to *Starkweather* was a legal and valid tender; and if it was, then, whether such tender and refusal were equivalent to payment, and discharged the land from the lien of the mortgage. It is well settled that a tender to an agent authorized to receive payment, is as good as a tender to the creditor in person. (1 *Campb. N. P. Rep.* 478.) That *Starkweather* was employed to conduct the pro-

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ceedings, as attorney for *M Collum*, is admitted; but it is urged, that before the tender was made, his power was revoked, in consequence of *M Collum's* instructions not to receive *the money, if it was offered, and saying that he would attend to the business himself. This was no general revocation, nor was it so intended. *M Collum* having determined not to receive the money, was willing to dispense with the services of his attorney conducting in the sale. The instructions must be understood as limited to these objects. A general revocation was evidently not contemplated. The bond and mortgage still remained in the hands of the attorney. Under such circumstances, the right of the attorney to receive the money continued; *M Collum* could not legally prohibit it, and *Starkweather* had the same right to receive payment as his principal. The case of *Moffat v. Parsons* (5 *Taunt. Rep.* 307.) is analogous. In that case, the plaintiff, expecting a tender would be made, instructed his clerk, previously authorized to receive money, that if the money was offered, he should not receive it, stating that he had put the matter into the hands of his attorney. The clerk, on tender made, refused to receive the money, and assigned the reason; yet this was held to be a good tender to the principal. The money having been tendered to a person authorized to receive it; the next question is what is the effect and legal operation of such tender, as it respects the mortgage. The bond is not in question; if payment had been made, then all right and title under the mortgage would cease, because "a mortgage, until foreclosure, is now considered as a personal engagement only, in which the land is merely pledged for the money, and remains in the mortgagor to every purpose, except that of securing the debt." (*Powell on Mortgages*, 170.) In the case of *Waters v. Stewart*, (1 *Caines's Cas. in Error*, 69.) the late Chief Justice *Kent* observed, "that the assignment of the debt, or even forgiving it, and that by parol, draws the land after it, as a consequence." From the nature of the interest the mortgagee has, there is no necessity for a re-conveyance by him to the mortgagor, after the mortgage has been paid; when that is done, the mortgagee has no title remaining in him to convey, and, consequently, by our laws, on payment of the money, he is not deemed a trustee holding the legal estate for the benefit of the mortgagor. The only remaining question is, whether a tender and refusal *are equivalent to payment. A tender by one party of payment of a debt or performing a duty, and a refusal by the other to accept thereof, do, in some cases, amount to a discharge. In *Bacon Abr* 457. title *Tender*, (F.) it is laid down, that "if *A.* borrow one hundred pounds of *B.*, and mortgage land to *B.*, with condition for the payment thereof, in this case, if *A.* tender the money, and *B.* refuse to accept thereof, the land is discharged, but the debt, which existed before the mortgage, remains, and may be recovered in an action." In *Co. Litt.* 209

b. sec. 338. the same doctrine is recognized: the reason assigned is, that the money is collateral to the land, and by the tender, the land is discharged; and it shall be accounted the folly of the mortgagee, that he refused payment when a lawful tender was made to him. (*Co. Litt.* 207. a. sec. 335. 20 *Viner*, tit. *Tender*, N. sec: 4.)

If this principle be correct, and we consider it as well settled, then the plaintiff has not shown a good title in his lessor, *Reuben M Collum*; and, consequently, judgment must be rendered for the defendant.

Judgment for the defendant.

THE PEOPLE against ISAAC COTTERAL and PETER CRANNAL.

THE prisoners were convicted of *arson*, at the last court of *Oyer and Terminer*, held in *Rensselaer* county, before Mr. Chief Justice *Spencer*. The prisoners were brought up on *habeas corpus*, &c., and from the returns to the writs of *certiorari*, it appeared that the indictment contained three counts: 1. for setting fire to a certain inhabited dwelling-house of *Jacob Deforest*, in *Troy*, on the 3d of *March*, 1820, and thereby feloniously, wilfully, and maliciously burning, consuming, and destroying the same: 2. for setting fire to the gaol of *Rensselaer* county, in *Troy*, being the *dwelling-house of *Jacob Deforest*, inhabited by him and his family, and feloniously burning the same: 3. stating that the prisoners, with others, were confined in the said gaol, and on the 2d of *March*, feloniously, wilfully, and maliciously set fire to the same gaol, being the dwelling-house of *Jacob Deforest*, the keeper of the gaol, and inhabited by him and his family, and the prisoners of the county of *Rensselaer*, confined by civil and criminal process; the same gaol being contiguous to other buildings, &c., with intent to burn, consume, and destroy the said gaol, &c.

It appeared that *Cotteral* was confined for horse-stealing, and *Crannal* for an assault and battery, with ten others, in the second story of the gaol. That in the room in which the prisoners were confined, upright planks on the inside of the brick walls were fastened with spikes to timber; plates of iron were then fastened to the planks, and another tier of planks laid transversely over the iron bars. On the night of the 23th of *February*, the prisoners took coals of fire from the stove, and put them into the crack between the planks lining the room, and blew the coals into a flame; their intention being to burn a hole large enough to admit a lever, so as to force off the plank, and by that means to effect their escape; but not

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Setting fire to a gaol by a prisoner, merely for the purpose of effecting his escape, is not *arson*, nor is it a *wilful burning of an inhabited dwelling-house*, within the meaning of the first sec-

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tion of the act declaring the punishment of crimes; (1 *N. R. L.* 407. sess. 36. ch. 20. 2 *Rev. Statutes*, 657. 666. 667.) though the gaol is to be deemed an inhabited dwelling-house, within the act.

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succeeding, the fire was extinguished by them: and a similar attempt was made by the prisoners, on the night of the 2d of March. A quantity of water had been saved by the prisoners out of their allowance, and as the fire increased, they threw on water to prevent its blazing and spreading. They succeeded in burning a hole through both tiers of planks, large enough for a man to pass through, and had forced up one of the iron bars and removed one of the bricks in the wall, when, about 3 o'clock in the morning of the 3d of March, one of the watchmen discovered a smoke issuing from the gaol, and gave the alarm of fire. The prisoners having expended all their water, the fire blazed through the planks to the top of the room, so as to be beyond their control, and the gaol would most probably have been consumed, had it not been for the exertions of the citizens, who extinguished the fire, before any material injury was sustained.

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*The jury found the prisoners guilty; and on the facts above stated, specially found, the chief justice suspended the sentence, in order to take the opinion of the court on the question of law, as to the malicious intent, so as to constitute the crime of arson, within the meaning of the statute.

Oakley, Attorney General. The first section of the act, (1 N. R. L. 407, sess. 36. ch. 29. s. 1. 2 Rev. Stat. 657. § 9.) creates a new crime different from the common law offence of arson. It declares that any person, duly convicted "of wilfully burning any inhabited dwelling-house, shall suffer death for the same." As the keeper lived in the gaol, with his family, it was an inhabited dwelling-house within the meaning of the act. (*People v. Van. Blaricum*, 2 Johns. Rep. 105.) The prisoners may have had no intention to burn the gaol, further than was necessary to effect their escape; but it is not requisite that the house should be absolutely consumed or burnt up, to constitute the crime of arson. (*The People v. Butler*, 16 Johns. Rep. 203.) The act speaks only of a wilful burning; the legislature presumed, no doubt, that no person could set fire to an inhabited dwelling-house, without a malicious intent. The common law offence of arson is defined to be the malicious and voluntary burning the house of another. (2 East C. L. 1015.) But under the first section of the statute, intentionally setting fire to an inhabited house, is a wilful burning, without any regard to the object in view. But if malice were necessary, it must be implied in this case. If a person who was confined for a felony, breaks the gaol, it is a felony. The prisoners were attempting to break the gaol, and must, therefore, have had a felonious intent. (*The People v. Duell*, 3 Johns. Rep. 449. *Hawk. P. C. B.* 2. c. 18. *Hale P. C.* 607. 612. 2 Chitty C. L. 79.) If a person, by shooting at the poultry of another, with intent to steal it, sets fire to the thatch of a house, it is arson. (2 East's C. L. 1019.) So, if A. maliciously in-

tends to burn the house of *B.* and the fire burns the house of *C.*, it is a malicious burning of the house of *C.* So if a man sets fire to his own house, by means of which his neighbor's house is burned, it is arson. (2 *East *C. L.* 1028. 1031.) It makes no difference whether the primary act is a misdemeanor or a felony. It is enough that the party is doing an unlawful act. A general malicious intent is enough to show particular malice. (1 *East C. L.* 230.) If this had been an indictment at the common law, there could have been no doubt of the malicious intent, so as to constitute the offence of arson.

At a late *oyer and termiher*, held in *Oneida* county, before Mr. Justice *Platt*, a prisoner who, with a view to effect his escape, had set fire to the gaol, in consequence of which one of his fellow prisoners was burnt to death, was tried for murder, and convicted, though he had no particular intention to hurt or burn his fellow prisoner.

Griffin and Wells, contra. If the attempt to break the gaol was a felony, this may be, perhaps, considered as a wilful and malicious burning; but the statute (1 *N. R. L.* 407. 412. sess. 36. ch. 29. s. 20. 2 *Rev. Stat.* 683. § 13.) merely makes it unlawful to be aiding or assisting a prisoner to escape. A bare attempt to escape from prison is not felonious. If a felon attempts escape himself, without aiding or assisting another felon to do so, it is not felony. The first section of the act does not create a new offence; it merely selects a more aggravated species of arson. If we look to the common law definition of the crime, we find that the word *wilful* is the all important and essential part of it; and that is the word used by the legislature. Malice alone is not sufficient. The act must be wilful. There must be a certain and precise intent. The legislature contemplated the direct intent to commit the specific crime of burning an inhabited dwelling-house. By annexing the highest punishment known in the law to the commission of the offence, they must have had in view the diabolical act of setting fire to an inhabited house, with a direct and specific intent to burn or consume it. Putting fire in such a place, as might possibly burn the house, without any intention to consume it, is not a wilful burning. Putting fire to a dwelling-house, if it does not take effect, is not arson. *A fortiori*, if the person who puts the fire in a situation to burn, does himself extinguish it. If he takes the benefit of the *locus penitentiae*, *if we may be allowed so to speak, and while it is in his power, prevents all evil consequences, he ought not to be deemed guilty of so heinous a crime as that of arson. The prisoners did not intend to burn the gaol; their object was to escape, and they made use of the fire, as an instrument merely to effect that purpose. Suppose a tenant about leaving a house, with a view to deface a room, should set fire to it, and then put it out, is this to be deemed a wilful burning, for which he is to suffer death? So if a

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robber, having entered an inhabited dwelling-house in the night time, accidentally sets fire to it with a lighted candle, but himself extinguishes the flame, is he to be punished, under the first section of this act, for a wilful burning of the house? There may be an implied or constructive malice; but there is no implied or constructive will or intention. The prisoners willed, or did not will, to burn up the gaol. To constitute murder, there must be not only a malicious killing, but a killing, *eo animo*. Here there was no will or intent to burn the gaol, or to commit arson.

The law, as to this crime, is more severe than in regard to murder. If a man attacks another with intent to kill him, but does not consummate that intention, it is not murder. So if a person administers poison to another, with intent to kill him, but the poison produces no effect, it is not murder; but if a man sets fire to an inhabited house, though it is not consumed, it is arson. The law being, then, so rigorous and severe in regard to this crime, it ought not, by any construction, to be extended further. In the case of *Rose Butler*, the fire was extinguished by the exertions of the family, not by the prisoner. The case put from *East*, as to a person feloniously shooting at poultry, and thereby setting fire to a thatched cottage, is stated without any authority cited to support it.

Oakley, in reply, said, that the crime was consummated the moment the fire took effect; and in regard to this crime, it makes no difference whether the whole or a part of the house is consumed. If the crime is once consummated, there can be no *locus penitentie*.

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*SPENCER, Ch. J., delivered the opinion of the court. A wilful setting on fire an inhabited dwelling-house, though the fire should afterwards go out of itself, or be extinguished by another, would constitute the crime of arson. And it has been decided by the court, that a gaol is an inhabited dwelling-house within the meaning of the act. But this case stands on peculiar grounds. It does not appear to have been the intention of the prisoners to burn the gaol. Their original and primary intention was to effect their escape, and the burning was merely for that purpose. It lay on the prisoners to show that it was no part of their intention to burn the gaol, and we think they have done so. The statute makes it felony, for a person to aid or assist a felon to escape from prison; but neither by the statute nor the common law, is the attempt of a felon to escape a felony. We think it would be carrying the doctrine too far, to say that setting fire to a prison by a prisoner, merely for the purpose of effecting his own escape, amounted to the crime of arson. Judgment must, therefore, be arrested.

Judgment arrested.

N. B. It appearing that the prisoner, *Cotteral*, had been convicted of horse-stealing, he was sentenced to the state prison for ten years; and the other prisoner was remanded.

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WARD against STOREY.

A JUDGMENT was docketed in this cause, in the Mayor's Court on the 23d of December, 1816, and a *feri facias* thereon delivered to *Ruggles Hubbard*, late sheriff *of the city and county, on the 27th of December, 1816. Judgments were subsequently docketed on different days, in nine other causes, against the same defendant, in this court and in the Mayor's Court. Certain real estate of the defendant was regularly advertised for sale by the late sheriff, and sold under the executions. An injunction was obtained from the Court of Chancery, to restrain the sheriff from executing a conveyance of the estate; and before it was dissolved, the sheriff was superseded, and *Bell*, the present sheriff, who was the under-sheriff, was appointed his successor. The late sheriff died soon afterwards, pending the injunction, and before any conveyance of the estate so sold. The respective plaintiffs in the several causes, and all the other parties interested, consented to waive their rights under the sale of the late sheriff; and that the real estate of the defendant should be resold by the present sheriff, who was advised, that having been appointed to the office of sheriff, he could not legally act in the capacity of under-sheriff, or deputy to his predecessor. New writs of *feri facias*, in five of the causes, were delivered to the present sheriff, at different times, with notice to him of the former executions delivered to his predecessor, and claiming priority according to the times of docketing the respective judgments. The present sheriff advertised the property, under the first execution delivered to him, and which was upon a judgment docketed among the first in point of time. Afterwards, and before the day of sale, several other writs of *feri facias* against the same defendant, entitled to priority to any of those above-mentioned, were delivered to the present sheriff, who sold the real estate under all the executions then in his hands. Five of the executions in the ten causes above-mentioned were delivered to him before the sale, one of them on the day of sale, and one of them

By the statute
(sess. 36. ch.
67. s. 5. 1 Rev.
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Stat. 379. § 73.)
on the death of
a sheriff, the
powers of the
under-sheriff to
act in the name
of the sheriff
survive, for the
benefit of the
parties interest-
ed in the ex-
ecution of the
process deliver-
ed to the
sheriff before
his decease;
and though the
under-sheriff is
himself ap-
pointed sheriff,
he may proceed
under the
provision of the
statute, as under-
sheriff. (a)

And where
there were several
judgments
docketed at
different times,
on some of
which execu-
tions were de-
livered to the
old sheriff, be-
fore his death,
and executions
on other judg-
ments, prior as
to the time
of docketing,
were subse-
quently taken
out and deliv-
ered to the new
sheriff, who
took and sold
the property of
plaintiffs should
judgments.

the defendant, under all the executions then in his hands, it was ordered that the several be paid out of the moneys in the sheriff's hands, according to the priority of their several judgments.

(a) When the office of sheriff becomes vacant by his election to another office, or by any cause besides his natural death, the under-sheriff cannot execute the duties of sheriff within the statute. (1 R. L. 420. § 5. Vide *Paddock v. Cameron*, 8 Cowen's Rep. 902. 1 Rev. Stat. 379. § 73.) Whenever a vacancy shall occur in the office of sheriff of any county, the under-sheriff shall in all things execute the office of sheriff of the county, until a sheriff shall be elected, or appointed, and duly qualified.

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long after the sale ; and in three of the causes, no new executions were delivered to the present sheriff. After satisfying the executions entitled to a priority over any of those in the ten causes above-mentioned, there remained a balance of money in the hands of the sheriff, but not enough to pay all the said judgments. A question having arisen between the sheriff and *the plaintiffs in those judgments, whether the sheriff could pay off those on which no executions had been delivered to him ; and if so, whether they were entitled to priority according to the times of docketing the respective judgments, or how otherwise, the points were, by mutual agreement, submitted to the court for their decision.

Per Curiam. Though, at common law, the powers of the under-sheriff cease, upon the death of the sheriff, yet by the statute, (1 N. R. L. 420. sess. 36. ch. 67. s. 5. 1 Rev. Stat. 379. § 72.) his power is continued for the benefit of all the parties interested. It is in the nature of a trust, and survives after the death of the sheriff. Mr. Bell, therefore, being under-sheriff, might, notwithstanding he was appointed sheriff, in the place of the former sheriff, proceed to act as under-sheriff, in the name of the deceased sheriff, by virtue of the provisions of the statute. We are of opinion, that the money remaining in the hands of the present sheriff ought to be paid to the plaintiffs in the several judgments, in the order of their priority, according to the times of docketing the same, without any distinction, as to executions delivered to him in his new office, or as under-sheriff.

Rule accordingly.

OLNEY against WICKES.

An overseer of the poor of a town, who con-
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tracted with the plaintiff for the maintenance of a pauper, for which he agreed to pay a certain sum per week, was held not to be personally responsible on the contract ; as, from the facts and circumstances of the case, it did not

THIS was an action of *assumpsit* tried before Mr. Justice Van Ness, at the Rensselaer circuit, in December, 1818. The declaration was for board and lodging, meat, drink, and *other necessaries, &c., provided, at the request of the defendant, for Francis Lona and his wife, &c. Plea *non assumpsit*, with notice that the promises stated, if made at all, were made by the defendant, in the character of an overseer of the poor of the town of Schaghticoke, and not in his individual capacity.

J. Mosher, a witness for the plaintiff, testified that he was present, on the 19th of July, 1816, when the defendant agreed with the plaintiff to give him three dollars a week, for boarding Francis Lona and his wife ; and the plaintiff, who resided in Saratoga county, accordingly took the paupers home with him. On his cross examination, the witness said that he

was a constable of *Saratoga*, and had an order of the justices of that place, to transport *Lona* and his wife, as paupers, from that town to *Schaghticoke*, in the county of *Rensselaer*, and employed the plaintiff, with his carriage, for that purpose: that he passed the *Hudson*, when he met the defendant, an overseer of the poor of *Schaghticoke*, about half a mile from his abode, and delivered the paupers to him, with the order of removal; that the defendant accepted the paupers and the order, and said that he had expected them, and on consultation with the inhabitants of *Schaghticoke*, it was concluded that the town would have to keep them. That at the time he so delivered the paupers and the order to the defendant, he supposed that he was in the town of *Schaghticoke*; but has since understood that it was in the town of *Easton*, in *Washington* county, near the line. That the agreement between the plaintiff and defendant about keeping the paupers, was subject to be terminated at the pleasure of either party. In *January*, 1817, the plaintiff told the defendant that he could not keep the paupers longer, for less than five dollars a week. On the 3d of *July*, 1817, the plaintiff sent the paupers back to the defendant, who was not at home at the time, and his family informed the person who brought them, that a *Mr. Curtiss* was the overseer of the poor, and directed that they should be delivered to him, which was accordingly done.

A witness for the defendant testified that he was present when the agreement was made between the plaintiff and *defendant, who was an overseer of the poor of *Schaghticoke*. The plaintiff offered to keep the paupers at three dollars a week; and the defendant said he would give it; that he could advance nothing then, but the plaintiff might be sure of his money. It was thereupon agreed, that the plaintiff should take the paupers. The defendant said that it was his duty, as overseer, to get the board as cheap as he could, as he was acting in the town business. *Mr. Curtiss* testified that he succeeded the defendant as overseer of the poor; that in *November*, 1817, the plaintiff requested him to fulfil the contract which he had made with the former overseer, and threatened to sue him. The witness said he was not liable; and as the plaintiff insisted that he was liable as overseer, they advised with a lawyer, who gave his opinion that the witness was not liable; and the plaintiff then sent word to the defendant, that if he did not pay his demand, he would sue him. Another witness, who was present when the agreement between the plaintiff and defendant was made, testified that the defendant told the plaintiff that he could not advance any thing; that he had already advanced his own, and the public money, in maintaining paupers; but that the plaintiff need not fear being paid; that his money was sure, and that the town was rich.

The judge expressed his opinion that the action could not be maintained; that the defendant contracted as overseer of

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appear that he intended to bind himself personally.

Where a public agent or officer acts ostensibly in the line of his official duty, his contracts are public, not personal: *It seems*, that an express promise to pay does not establish the criterion of personal responsibility; and where the transaction shows the engagement to be on account of the public, it is not necessary, in order to avoid his own liability, that the officer should express-

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ly say that he contracts in his official capacity.

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the poor, and must, therefore, be sued in that character, and not in his individual capacity; but said the plaintiff might, if he pleased, take a verdict subject to the opinion of the court on the question. A verdict was, accordingly, taken for the plaintiff, for 219 dollars, subject to the opinion of the court on the case above stated.

Livingston, for the plaintiff.

Mitchell, contra.

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PLATT, J. This is an action of *assumpsit*, for meat, drink, and lodging, furnished by the plaintiff to one *Francis Lona and his wife*, at the request of the defendant. The only question is, whether the defendant contracted as a *private individual*, or in his *official character*, as one of the overseers of the poor of the town of *Schaghticoke*.

There is no longer any question as to the rule of law, that where a public agent acts ostensibly in the line of his duty, his contracts are *public*, and not *personal*. It is also clear, that a known public agent, acting within the scope of his authority, and contracting for the use of the public, may, by special agreement, superadd his personal responsibility, so as to render himself individually liable: but, (as was correctly remarked by Ch. J. *Marshall*, in *Hodgson v. Dexter*,) "under these circumstances, the intent of the officer to bind himself personally, must be very apparent, indeed, to induce such a construction of the contract."

As in most other cases, the difficulty here is in the application of the rule. It is a question of intention in the contracting parties, to be collected from all the facts and circumstances of the case.

(The judge here stated the facts of the case.)

From this evidence, I think the fair inference is, that the parties mutually understood that the defendant contracted as overseer of the poor. In saying that "*he was acting in the town's business*," that "*the town is rich*," and "*you will be sure of your money*," the idea of personal liability seems to be repelled; and the subsequent demand on the defendant's successor in office, confirms the supposition, that it was regarded as the contract of a *public agent*.

In the case of *Gill v. Brown*, (12 *Johns. Rep.* 385.) there was not only an *express promise to pay*, on the part of *Brown*, (who was quarter-master,) but the decisive feature in that case was, that it was a contract *not within the regular scope of his authority*.

In *Walker v. Swartwout*, (12 *Johns. Rep.* 444.) the promise by *Swartwout* was as *express* and *positive* as could be framed: "*my word is sufficient: go to your work, and I will pay you when it is done*." Yet, as it appeared that the defendant spoke

with reference to the public service under his charge, as quarter-master-general, this court (*Thompson*, Ch. J., dissenting) decided that he was not personally bound: and I refer, with great satisfaction, to the concise and discriminating review of the adjudged cases, by Mr. Justice *Spencer*, who delivered the opinion of the court.

*In *Brown v. Austin*, (1 *Mass. Rep.* 208.) the same rule was sanctioned: viz. that an officer treating as an agent for the public, is not personally liable.

In *King v. Butler*, (15 *Johns. Rep.* 281.) the defendant, being overseer of the poor, "requested and directed the plaintiff to provide all things necessary" for the recovery of a sick stranger then at the plaintiff's house, and said "*he would see the plaintiff paid.*" The plaintiff furnished the necessaries accordingly; and then presented his account to the board of supervisors, as a county charge, for supporting a transient sick pauper, which was rejected by the supervisors, because the overseer had never obtained a justice's order for the relief. The plaintiff then sued the overseer; and it was held, that he was personally liable. One ground of that decision was, that the officer had neglected his duty in not obtaining the justice's order, which was an indispensable voucher at the board of supervisors. But it is also worthy of remark, that the form of contracting, "*I will see you paid,*" was in the style of a special guaranty, and distinguishable, in some degree, from the present case.

I cannot admit, however, that an express promise to pay by the contractor, forms the criterion of personal responsibility. For the question recurs, in what character does he contract? As a public agent, or as a private person?

Where the *res gesta*, and the attending circumstances, show the contract to be on public account, it is not necessary, in order to screen him from personal liability, that the contractor should expressly say, *I contract as quarter-master*, or *I promise to pay as overseer of the poor*.

The case of *Macbeath v. Haldiman*, (1 *Term Rep.* 172.) and the case of *Hodgson v. Dexter*, (1 *Cranch*, 345.) are polar stars, which, in my judgment, guide us to a decision in favor of the defendant in this case.

VAN NESS, J., and YATES, J., concurred.

SPENCER, Ch. J., dissenting. If the defendant rendered himself personally liable to the plaintiff on his contract, to pay for the maintenance of the paupers, then the two objections, *that the suit should have been against him as overseer of the poor, &c., and that the venue should have been laid in *Washington* county, fall to the ground.

The defendant's official character in the supposed case, is

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not the principal basis of the action ; it may have had its influence in producing the promise, but the plaintiff did not rely upon it. It is not necessary to state it. Where the right of action against an officer is founded on the obligation of law, unconnected with any contract between the parties, then the office of the defendant must be stated, and the circumstances which gave rise to the defendant's particular duty or liability, as in actions against sheriffs, carriers, inn-keepers, &c. (1 *Chitty Pl.* 369.)

It is not a case within the act ; (1 *R. L.* 155.) the statute requires that where actions on the case, trespass, battery, or false imprisonment, are brought against any sheriff, &c., and including overseers of the poor, for or concerning any matter or thing by them done, by virtue of their office, the action is to be laid within the county where the trespass or fact is done ; and if, on the trial, the plaintiff shall not prove that the cause of his action arose within the county wherein such action is laid, the jury shall find the defendant *not guilty*.

This statute, by "actions on the case," evidently meant actions for mis-feasance or non-feasance, and sounding in *tort*, for the verdict is to be not guilty, and the promise of the defendant, if personally binding, is not to be regarded as an official act.

The judge who tried the cause, expressed a pretty decided opinion, that the defendant contracted as overseer ; and ought to have been sued in his official, and not in his individual, character.

In the case of *King v. Butler*, (15 *Johns. Rep.* 291.) we held that the overseer was liable to a suit, where he had requested the plaintiff to maintain the pauper, and made an express and absolute promise to pay him for the same. This case is governed by the principles applicable to the question, whether credit was given to the individual in his private capacity, or as an agent of the town. In *Gill v. Brown*, (12 *Johns. Rep.* 388.) Chief Justice *Thompson* observed, *that it is a question of intention, and if the agreement shows that the contract was made evidently on public account, without a view to the personal responsibility of the agent, he will not be liable. But where, as in the case of *Walker v. Swartwout*, (12 *Johns. Rep.* 446.) the agent makes an express promise, in his own name, and not in the name or on behalf of his principal, the agent ought to be held personally responsible. So, also, in the case of *Brown v. Austin*, (1 *Mass. Rep.* 208.) it was held, that an agent, by an express promise to pay, rendered himself personally responsible.

The proof in this case is very positive, that the defendant's engagement was precise and express, to pay the plaintiff three dollars per week, for keeping the paupers ; and there can be no reasonable doubt that the plaintiff was induced to take and

provide for the paupers, relying on the defendant's personal responsibility.

NEW-YORK,
May, 1820.

CADY

v.

FAIRCHILD.

WOODWORTH, J., was of the same opinion.

Judgment for the defendant. (a)

(a) Vide *Mott v. Hicks*, 1 Cowen's Rep. 513. *Fox v. Drake*, 8 Ibid. 191. post, 407. *Flower v. Allen*, 5 Cowen's Rep. 658

Moss against MOORE.

IN ERROR, on *certiorari*, to a Justice's Court.

Moore brought an action against *Moss*, for the penalty for exacting excessive toll, imposed by the act to establish a turnpike road company, &c. called the *Seneca Turnpike Road Company*, passed April 1st, 1800, (2 K. & R. ed. L. 412. 423. sess. 23. ch. 78. s. 11.) The *eleventh* section of the act, in fixing the rates of toll, says, that "every wagon with two horses," shall pay *twelve and a half cents*; every "one horse cart," *six cents*; "every chair or pleasure carriage with one horse," *twelve and a half cents*. The plaintiff, with another person, was passing on the road in a *one horse wagon*, made with a spring seat and paneled sides, *and which was not used for farming purposes, or for carrying goods. The act makes no mention of a *one horse wagon*. There was a verdict for the plaintiff below, for the penalty of *five dollars*, on which the justice gave judgment, with costs.

A one horse wagon with a spring seat and paneled sides, used only for the carriage of persons, is "a pleasure carriage," within the meaning of the *eleventh* section of the act establishing the *Seneca Turnpike Road Company*, (K. & R. ed. L. [* 129] 412. 423. sess. 23. ch. 78.) and is liable to pay toll.

Per Curiam. We are clearly of opinion, that the judgment in this case was wrong. The one horse wagon in which the plaintiff was riding, was a "pleasure carriage," within the meaning of the act. If it was not, it was not liable to pay any toll; for it was not a "one horse cart." The judgment must be reversed.

Judgment reversed.

CADY against FAIRCHILD and WIFE.

IN ERROR, on *certiorari*, to a Justice's Court.

Cady brought an action of trespass against *Fairchild* and his wife, who pleaded not guilty. The plaintiff and defendants lived under the same roof, occupying distinct parts of the house. The plaintiff, who had a lease for one year, removed with his family, and the principal part of his furniture, before the expi-

In an action of trespass in a Justice's Court, where there is a verdict and judgment for the defendant, the court will not reverse the

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judgment, because the verdict is against evidence, if it appears that the injury was trivial, and the plaintiff entitled to nominal dam-

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ages only, and the suit is merely for costs and vexation.

ration of the year, leaving a few old articles, of little value, in the apartment he had occupied. The defendants put the articles so left by the plaintiff, out of the house, where they remained for several days, and were then put back again by the defendants, without receiving any material injury. There was a trial by jury, and a verdict for the defendants, on which the justice gave judgment.

Per Curiam. This is strictly a verdict contrary to evidence ; but as no more than *nominal* damages ought to have been given, no material injustice has been done ; and we ought to apply the rule which has been settled in regard *to new trials. In *Burton v. Thompson*, (2 *Burr. Rep.* 664.) Lord *Mansfield* said, " it does not follow, by necessary consequence, that there must be a new trial granted in all cases whatsoever, where the verdict is contrary to evidence ;" as " where there is no real damage, and where the injury is so trivial as to not deserve above half a crown compensation ;" and a new trial was denied in that case, though it was admitted that the verdict was directly contrary to evidence. (a)

Though there is ground for a distinction between granting a new trial, and reversing a judgment, on return to a *certiorari* ; yet, where the object of the plaintiff in error is merely costs, and to *vex* the defendant, we are justified in refusing to reverse the judgment. The judgment must, therefore, be affirmed.

Judgment affirmed. (b)

(a) Vide *Hyatt v. Wood*, 3 *Johns. Rep.* 239. *Fleming v. Gilbert*, *Ib.* 528. *Fester v. Whipple*, 8 *Johns. Rep.* 369.

(b) A *certiorari* lies to reverse a judgment of nonsuit, where costs are awarded against the plaintiff. (*Smith v. Sults*, 2 *Johns. Rep.* 9.)

STRONG against BEARDSLEE.

Under the "act to extend the jurisdiction of justices of the peace," (sess. 41. ch. 94.) passed April 10th, 1818, where the demand exceeds

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25 dollars, either party has a right to demand that the jury should consist of twelve ; but he must make his demand, for that purpose,

IN ERROR, on *certiorari*, to a Justice's Court.

Beardslee sued *Strong* for beating and wounding his dog and claimed fifty dollars damages. *S.* pleaded not guilty, and the plaintiff demanded a trial by jury. The cause was then adjourned, and at the adjourned day, the parties appeared, when the *venire* was returned with a pannel of twelve jurors, from which the justice drew six, who were sworn ; the defendant insisted, that the cause ought to be tried before *twelve jurors, as the damages claimed were above 25 dollars ; the justice overruled the objection, and there was a verdict and judgment for the plaintiff, for 17 dollars, and costs.

Per Curiam. According to the true construction of the 22d section of the "act to extend the jurisdiction of justices of the

peace," (sess. 41. ch. 94.) passed April 10th, 1818, where the sum demanded exceeds 25 dollars, either party has a right to insist, that the jury shall consist of *twelve*, instead of six jurors: but the party must make his demand of the justice, that the jury should consist of *twelve*, before the *venire* is issued, so that *twenty* may be summoned. Here the *venire* was for *twelve* jurors, and there was no demand or claim to have more summoned, until *six* were drawn and sworn. The defendant was then too late. The judgment must be affirmed.

Judgment affirmed.†

RICKEY against BOWNE.

IN ERROR, on *certiorari*, to a Justice's Court. *B.* brought an action of trespass on the case, against *R.*, who pleaded the general issue, with notice of a set-off. The plaintiff and defendant, with one *George Weeks*, made a joint contract, as carpenters, to build a barn for *A.*, for which they were to receive 150 dollars. They worked together, furnished materials and provisions, and paid money to laborers, upon the job, in unequal proportions, and the accounts between them were unsettled. The object of the suit was to recover a balance claimed to be due to the plaintiff, from the defendant, on account of that joint contract or partnership.

* There was a verdict and judgment in the court below, for the plaintiff, for 18 dollars and 48 cents, with costs.

On the return to the *certiorari*, the exceptions taken were, 1. That a suit at law will not lie for the balance, it being a partnership transaction. 2. That the judgment for costs included the *venire* which issued upon the request of the plaintiff below.

Per Curiam. Partnership accounts may be adjusted and closed, either by a suit *in equity*, or by an action of *account* at law. The acts constituting the courts of justices of the peace give jurisdiction only in actions of "*debt, detinue, covenant, trespass, and trespass on the case.*" The action of *account* is not comprised in this enumeration; and the peculiar mode of trial by *auditors*, is not provided for in those acts. The justice, therefore, had no jurisdiction.

As to the second objection, we think it not founded. The costs of a *venire* must always abide the event.

Judgment reversed.†

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before the *venire* issues, in order that *twenty* may be summoned: if he waits until a *venire* is returned with *twelve*, *six* of which are sworn, he is too late, and must be concluded.

† Vide 2 Rev. Stat. 242.

Though partnership accounts may be adjusted and closed in an action of *account at law*, yet the courts of justices of the peace have no jurisdiction of an action of *account*: and, any other action by one partner against his co-partner, there

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being no *account* stated or balance admitted between them, is not sustainable at law.

Where a jury is demanded, and a *venire* issued at the instance of one of the parties, the costs of the *venire* abide the event of the trial before the justice.

† Vide 2 Rev. Stat. 225.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN AUGUST TERM, 1820, IN THE FORTY-FIFTH YEAR OF OUR
INDEPENDENCE.

BREWSTER *against* VAN NESS.

A sheriff is bound to pay over to the plaintiff, without any demand or request for that purpose, money levied on execution, or he will be liable to an attachment. It is not sufficient to return that he has the money in his hands, subject to the plaintiff's order.

R. SEDGWICK moved for an attachment against the defendant, late sheriff of *Saratoga*, for not paying over to the plaintiff, money levied and received by him on a *test. fi. fa.* It appeared that the sheriff had made a return to the execution, that, on the 25th of *October*, 1819, he levied 146 dollars and 48 cents, with interest from the 20th of *November*, 1818, and had the money in his hands, subject to the plaintiff's order; and that the money had not been paid over to the plaintiff. The counsel for the defendant objected, that the plaintiff ought to have applied to the sheriff for the money before he moved for an attachment; that the return made by the sheriff was a sufficient compliance with the exigency of the writ.

Per Curiam. The sheriff was bound either to pay over the money to the plaintiff, without any previous demand upon him for that purpose, or to have paid it into court.

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*The plaintiff may take a rule, that the defendant forthwith pay over to the plaintiff the amount levied on the execution, together with the costs of this application, or that an attachment issue against him.

Rule accordingly.

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August, 1820.KEYS
v.

BEARDSLEY.

A defendant *non compos mentis*, but of full age, and not an idiot from nativity, may appear by attorney; and the court, on motion, will appoint an attorney for him.

FAULKNER *against* M'CLURE and others.

P. RUGGLES, for the plaintiff, moved that *Stephen Jackson* and *Wheeler Case*, attorneys of this court, be appointed attorneys to plead and defend in this cause, in behalf of *William M'Clure*, and *Nancy M'Clure*, two of the defendants, who were *non compos mentis*, but not idiots from nativity, and were of full age. He read an affidavit, stating that *Jackson* and *Case* had given notice of retainer for one of the defendants, and that they were willing to appear for the said *William* and *Nancy*. He stated, that he did not know of any adjudged case, which determined the rule of practice in such a case; except what is said by Lord *Coke*, in *Beverly's case*, (4 Co. 124. b.) that "an idiot, in an action brought against him, shall appear in proper person, and he who pleads best for him shall be admitted, as appears in 33 *Hen. VI.* 18. b. Otherwise, it is of him who becomes *non compos mentis*, for he shall appear by guardian, if he is within age, and by attorney, if he is of full age."

Per Curiam. This court has no settled rule of practice, in a case like the present; but we see no objection to granting a rule that the attorneys who have been named, appear and defend for the defendants, stated in the affidavit to be of unsound mind and of full age.

Rule granted. (a)

(a) Vide 1 *Collinson on Lunacy*, 341. s. 10, 11, 12, 13. p. 342. s. 15. If an idiot has irregularly appeared, and defended an action by attorney, it cannot be assigned for error. 2 *Sund.* 336. The court of K. B. will not discharge a defendant from custody, on common bail, on the ground of his being insane at the time of his arrest, or had become so afterwards. *Kernot v. Norman*, 2 *Term Rep.* 390. *Nutt v. Verney* and others, 4 *Term Rep.* 121.

*KEYS *against* BEARDSLEY.

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LOUCKS, for the defendant, moved for judgment as in case of nonsuit, for not proceeding to trial, &c. It appeared that the plaintiff, after giving notice of trial at the last circuit, countermanded the notice.

Talcot, for the plaintiff, offered to stipulate; and the question was, whether the defendant was not entitled to costs, for preparing for trial, after the notice and before the countermand. He cited *Jackson v. Mann*, 1 *Caines's Rep.* 123.

If a plaintiff, after giving notice of trial, countermands it, he must pay to the defendant the costs incurred by him between the time of receiving the notice and the countermand.

Per Curiam. The plaintiff may stipulate; but he must pay
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WOODWORTH.

to the defendant his costs, if any have arisen between the time of receiving the notice of trial and the countermand.

JACKSON, *ex dem.* WADSWORTH, *against* WOODWORTH

Where a rule for a commission to examine witnesses is obtained after the expiration of four days in term, after issue joined in the cause, it does not stay proceedings, unless the court specially direct that it is to have that effect; and if the commis-

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sion is obtained within the four days, it will stay the proceedings of course, though nothing is said in the rule, as to its effect.

It is, therefore, unnecessary to state in the rule, whether it is to operate as a stay of proceedings or not; unless by the special direction of the court, on application for that purpose.

FOOT, for the plaintiff, moved, in this, and several other suits by the same plaintiff, against different defendants; that the defendants pay to the plaintiff the costs of noticing and preparing the causes for trial at the last *Seneca* circuit. A rule for a commission to take the examination of witnesses residing in *Hartford*, in the state of *Connecticut*, was obtained by the defendant on the 13th of *May* last, and the interrogatories settled on the 2d of *June*, and with the commission, were forwarded the next day. There was an affidavit of merits, and of the materiality of the evidence intended to be obtained under the commission. On the 12th of *June*, 1820, the defendant's attorneys informed the plaintiff's attorney, that *it would not be possible to have the commission executed in time for the circuit, and that they should rely on the issuing of the commission, as a stay of proceedings, &c. It appeared that the suit was commenced after *January* term, 1819, and that issues were joined in these causes, on the 14th of *June*, 1819, and that they were noticed for trial at the last *Seneca* circuit, held before Mr. Justice *Van Ness*, in *June* last, when the trial was put off on motion of the defendant's counsel, the question as to the payment of the plaintiff's costs being reserved by the judge. Nothing was said in the rule entered for the commission about its operating, or not, as a stay of proceedings.

Per Curiam. If a commission is obtained within the time required by the rules of the court, that is, four days in term next after issue joined in the cause, it will stay proceedings, of course, without any thing being said to that effect in the rule. If the rule is obtained after the four days, it does not stay proceedings, unless so directed by the court on application for that purpose. Though it may be the practice of the bar to insert in the rule, when obtained after the four days, that it is *not* to operate as a stay of proceedings, such a precaution is unnecessary, as, under the rules of the court, it could not have that effect. In the present case, the commission was moved for long after the expiration of the four days; and the defendants must pay the costs of putting off the cause at the last circuit.

Motion granted

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*PRESIDENT, DIRECTORS AND COMPANY OF THE BANK
OF AUBURN *against* AIKIN and WEED.

BANK OF AU-
BURN
v.
AIKIN.

THIS was an action of assumpsit on a promissory note. The defendants pleaded two pleas, 1. Non assumpsit; 2. That the plaintiffs are not a body politic and corporate, &c. On the 12th of June, 1819, there was a replication to the second plea, that the plaintiffs are a body politic and corporate, and have a right to sue, &c., and this the plaintiffs pray may be inquired of by the country, &c., to which was added a *similiter*; and the said defendants do the like, &c. On the 26th of June, being the first day of the circuit, the defendants' attorney delivered to the plaintiffs' attorney, a demurrer to the replication; but without having struck out the *similiter*, or giving notice of striking it out. On the 1st of July, being the last day of the circuit, the plaintiffs, who had noticed the cause for trial at the circuit, on the issues so joined, took an *inquest* by default. It appeared, that the demurrer was filed in the clerk's office on the 12th of July.

Where the plaintiff adds the *similiter* to his replication, the defendant may demur without actually striking out the *similiter*, the demurrer being a sufficient notice for that purpose.

Nul tiel corporation is a good plea in bar, where the plaintiffs are sued by a particular name; and the plaintiffs must reply specially, showing how they were made a corporation, where the act incorporating them required certain things to be done before they could become a corporation. (a)

Oakley, (Attorney General,) for the defendants, now moved to set aside the inquest for irregularity. If the plaintiff has added the *similiter* to his replication, the defendant may strike it out and demur. (*Tidd's Pr.* 678.) In *Boardman v. Brunson*, (*Col. Cases*, 46.) this court said, that where the demurrer was filed within the *twenty days*, according to the 9th rule of *April term*, 1796, it was not necessary to strike out the *similiter* from the plaintiff's replication.

Nul tiel corporation is a good plea in bar; (*Bro. Abr. tit. Corp.* 44. *tit. Misnomer*, 73. 22 *Elw.* IV. 34. 1 *Saund.* 340. b. *Viner Abr. tit. Corp.* p. 303. 316. (1 *Kyd on Corp.* 281.) and the plaintiffs must reply to such a plea, specially setting forth how they are a corporation. (1 *Kyd on Corp.* 284. *Gilb. Cases*, 253. *Cambridge University v. Crofts*, 44 *Assize*, 9. *Bro. Abr. tit. Corp.* 44.)

**Cady*, contra. In *Shultys v. Owens*, (14 *Johns. Rep.* 345.) the court said that the plaintiff was not bound to wait twenty days after the replication tendering an issue, to which the *similiter* was added, before noticing the cause for trial, to see if the defendant would demur or not; and that the practice of striking out the *similiter* and demurring, &c. was a fraud upon the rule of *April term*, 1796, which was intended merely to allow the party time to put in a demurrer *bona fide*. The de-

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(a) *Vine Bank of Auburn v. Weed*, 19 *Johns. Rep.* 300. Where Judge Spencer, who delivered the opinion of the court, said, that though *anciently* such a plea was admissible, and there were many precedents of such a plea, yet it was opposed to the principles of good pleading in modern times, and ought not to be allowed, but the fact should be given in evidence under the general issue. See also *Wood v. The Jefferson County Bank*, 9 *Cowan's Rep.* 203.

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v.
HAIGHT.

murrer in this case, was not filed until after the *nisi prius* record was made up and sealed.

Per Curiam. No doubt the plea was put in for delay; but we cannot say that the defendant had no right to plead such a plea. But the replication was bad. The plaintiffs ought to have replied specially, and shown how they were a corporation; for the act by which they are incorporated requires certain things to be done before they can be a corporation. It is not necessary, actually, to strike out the *similiter*; the demurrer is a sufficient notice for that purpose. (*Col. Cases*, 46.) The motion of the defendants must be granted, with costs; but the plaintiffs have leave to amend their replication.

Motion granted.

WATKINS against HAIGHT.

The act relative to writs of error on judgments of courts of common pleas, passed April 5th, 1817, (sess. 40. ch. 179.) is not retrospective, but prospective merely.

IN ERROR to the Court of C. P. of *Steuben* county. On the 20th of *June*, 1815, a rule for judgment was entered in the court below; and on the 28th of *June*, the judgment record was signed, filed, and docketed. The writ of error was tested *May* 1st, 1820, directed to the court below, and returnable to this court on the first *Monday* of the present term. The writ and return were filed in the office of the clerk of this court, on the 26th day of *June*, 1820.

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* *Collier*, for the defendant in error, now moved to quash the writ of error, on the ground of the statute of limitations, passed April 5th, 1817, (sess. 40. ch. 179.) (a) which declares, "that all writs of error upon judgment, in any court of common pleas or mayor's court, shall be brought within *five years* after rendering such judgments, and not after." Here the rule for judgment was entered the 20th of *June*, 1815, and the writ of error was filed the 26th of *June*, 1820, so that the five years had elapsed after rendering the judgment. Though the English courts will not, on motion, quash a writ of error, it is because the statute of 10 and 11 *W. III.* c. 14. contains exceptions of infants and others. (*Tidd Pr.* 1064, 1065.) But our statute contains no exception whatever; and this court will not look beyond our own statute. (3 *Johns. Rep.* 253.)

(a) All writs of error upon any judgment rendered in any cause of any court of law or of record, must be brought within two years after the rendering of such judgment, and not after; except in the case of a *feme covert*, *infancy*, *insanity*, and imprisonment on criminal charge, for any time less than life; and the existence of any of these disabilities will not authorize the bringing of a writ of error upon any judgment after the expiration of five years from the time of rendering the same. 2 *Rev. Stat.* 594. § 21 to 24.

The statute begins to run from the time of rendering the judgment, and not from the time the judgment roll is signed and filed. (*Arnold v. Sandford*, 14 *Johns. Rep.* 417. 424.)

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M Kown, contra. The writ of error was tested the 13th of *May*, 1820, and filed the 26th of *June*, and the judgment was docketed the 28th of *June*, 1815, so that five years had not elapsed. But if the period of limitation had elapsed, we contend that the act is clearly prospective, and not retrospective. It was passed in 1817, and was a new enactment; for the former statute of limitations was silent as to writs of error to courts of common pleas. Though the act itself contains no words to show the intent of the legislature in this respect, yet the only rational and sound construction of it is to consider it altogether prospective, and as intended to operate only on judgments rendered after the passing of the act. By any other construction, it would be manifestly unjust and unequal in its operation. Besides, on the principles recognized by this court in the case of *Dash v. Van Kleeck*, (9 *Johns. Rep.* 493. 500.) the statute would be unconstitutional, and void as a retrospective or *ex post facto* law.

Collier, in reply, said, that the act was intended to quicken suitors and quiet judgments, and, as it contained no words to the contrary, it must be construed so as to have effect on all judgments then existing, as well as on those to be rendered afterwards.

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Per Curiam. The case of *Dash v. Van Kleeck* shows that it would be unjust and against the sound principles of legislation, to consider the act as retrospective. It must be deemed prospective merely; and the motion, therefore, is denied.

Motion denied.

PETERS against PARSONS.

IN ERROR, on *certiorari* to a Justice's Court. It appeared that the plaintiff below had declared on a promissory note, for \$26 and 73 cents, and the defendant below pleaded specially in bar of the action, his discharge under the insolvent act of *April*, 1813, from all his debts, and averring that both plaintiff and defendant were citizens of this state. To this plea there was a general demurrer and joinder; and after argument of the demurrer, the justice gave judgment for the plaintiff, for \$29 and 53 cents, with costs.

The justice had made a return to the *certiorari*, and the as-

The act enlarging the jurisdiction of justices of the peace, (sess. 41. c. 94. s. 17.) which gives the party aggrieved, where the judgment is above 25 dollars, an appeal to the court of common pleas, refers only to

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cases in which
a judgment is
given, after trial
of an issue in
fact, and not to
a case of a
judgment on de-
murrer, or an
issue at law. (a)

(a) 2 Rev. Law,
225.

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signment of errors therein had been served on the defendant in error, who obtained an order to stay proceedings until this term: A motion was now made in behalf of the defendant in error, to quash the writ of error, on the ground that the judgment in the cause being for above the sum of twenty-five dollars, the remedy for the person aggrieved, by the late *act to extend the jurisdiction of justices of the peace*, (sess. 41. c. 94. s. 17.) was by *appeal* to the court of common pleas of the county, and not by *certiorari*.

For the plaintiff in error, it was contended, that the act, in regard to judgments above 25 dollars, referred only to cases in which an issue in fact was joined in the suit before the justice. All the provisions of the act in regard to appeals, *apply to issues in fact only. In this case there was a demurrer, or an issue at law.

Sperry, for the defendant in error.

Switland, for the plaintiff in error.

Per Curiam. The act of April 10, 1818, which extends the jurisdiction of justices of the peace to fifty dollars, and gives the party, against whom a judgment is rendered for above 25 dollars, an *appeal* to the court of common pleas, refers only to judgments rendered on a verdict, or without a jury trial, upon an issue in fact; not to cases where the justice gives judgment on a demurrer, or issue at law. This is evident from the provisions contained in the 18th and 19th sections, as to the proceedings on the appeal. The motion must, therefore, be denied.

Motion denied.

KING and MEAD against MARY PADDOCK

Where a married man sailed in a vessel from New-York, on a voyage to South America, and neither he nor the vessel had ever been heard of since, this was held to

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be sufficient evidence of his death, on a plea of *coverture*, in an action brought against his wife (as a *feme sole*.)

ASSUMPSIT for goods sold and delivered, tried before Mr. Justice Van Ness, at the New-York sittings, in June, 1819.

The declaration contained the common counts for goods sold and delivered, and the defendant pleaded *non assumpsit*, with notice that she should give evidence of her *coverture*.

At the trial, the plaintiff proved that he sold and delivered *to the defendant, in April, 1817, fifty-eight *Leghorn* hats, at 27 dollars each, amounting to 1,566 dollars. The defendant produced the bill of parcels, dated the 26th of April, 1817, in which the hats were numbered from 38 to 60, and at the foot of it was a memorandum that the sale was at 2, 3, and 4 months' credit, and the extra crowns to be delivered as soon as they shall arrive, free from any charge.

The defendant offered to prove that it was part of the contract, that the extra crowns, which were to be delivered according to the above memorandum, were to match those already delivered, that is, to be equal or superior in size and fineness; that in *August*, 1817, the plaintiffs sent to the defendant the extra crowns, which would not match a higher number than 46, which is a low number, and were of different qualities. That the first parcel was received by the defendant on *Saturday*; and that, relying on the assurances of the plaintiffs that the extra crowns would soon be received, the defendant, on *Monday* following, cut up all the flats, except two, and the half rims, to which the extra crowns would belong, were numbered and laid aside. That the fine hats, without the extra crowns to match, would not sell for half their value, and that the fronts alone could hardly be sold for any price. That the hats were always sold with double crowns, so that, from one of them, two hats were made. That the defendant, though she made the first payment after the extra crowns were sent to her, told the plaintiffs she would pay no more until she was compensated, and that the reason why she did not return the hats was, that they had been cut up, in expectation of receiving the extra crowns to match them.

This evidence was overruled by the judge. To prove the coverture of the defendant, her mother testified, that she married *Reuben Paddock*; that she last saw her husband about twelve years ago. That he was a master of a vessel, and sailed from *New-York* at the time of *Miranda's* expedition, on a trading voyage to *South America*, intending to return; but neither the defendant, nor any other person, to the knowledge of the witness, had ever heard of him, nor *of the vessel in which he sailed, nor of any of the crew, since they sailed from *New-York*.

The judge left the fact of coverture to the jury; but charged, that the evidence afforded a presumption of the death of the defendant's husband, which was not to be resisted, and that they ought to find a verdict accordingly. The jury found a verdict for the plaintiffs, for the balance of their account, with interest.

A motion was made to set aside the verdict, and for a new trial.

Antho'n, for the defendant. He cited, 1 *Campb. N. P. Rep.* 190. 2 *East's Rep.* 312.

T. A. Emmet, contra. He cited 7 *East's Rep.* 479.

SPENCER, Ch. J., delivered the opinion of the court. The objection made at the trial, that the defendant was a *feme covert*, was totally unsupported by proof. The long and continued absence of *Reuben Paddock*, from the *United States*,

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KING
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twelve years
after the depart-
ure of her hus-
band.

The plaintiff sold to the defendant a quantity of *Leghorn* hats of certain qualities, for a certain price, and engaged to deliver extra crowns to match those delivered, free of charge, but the crowns sent did not match, whereby the defendant sustained a loss: *Held*, that though the defendant had not returned, or offered to return the hats, she might, in an action brought against her nevertheless, insist on a deduction of the price originally agreed to be paid, in proportion to the diminution of the value of the article.

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diminished value
of the article

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without any account of him for twelve years, under the circumstances of this case, furnished an irresistible presumption, from analogy to the statute of bigamy, and the statute concerning leases determinable upon lives, that he was dead. In the present case, the jury were authorized to presume his death in a much shorter period. The facts justified them in presuming *Paddock's* death, by the foundering or wreck of the vessel in which he left *New-York*. The presumption does not rest merely on the fact of his not being heard from, but from the vessel never being heard of, nor any part of the crew. The language of the judge could not be too strong in regard to the fact of *Paddock's* death, and there was nothing for the jury to deliberate on.

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On the second ground, we are of opinion (and in this the judge who tried the cause concurs) that the defence set up ought to have been gone into, with a view to the reduction of the amount claimed, and that the defendant was not driven to her cross action. We know of no case, in which there is an omission to return the article agreed to be sold, which precludes the defendant from contesting the *price, on the ground that it was not returned to the vendor; excepting the cases of conditional sales, where the thing about to be sold is taken on trial, with liberty to the vendee to return it, if he dislikes it, in a limited period. We are, also, of the opinion, that the point whether the defendant could rescind the contract of sale, does not arise. The defence proceeded, on the ground that the defendant was liable only to pay what the hats were worth, considering that a circumstance essential to their value, and which the plaintiffs by the terms of the contract were bound to supply, had not been supplied. The substance of the contract of sale was this: the plaintiffs sold the defendant fifty-eight Leghorn hats, of particular numbers, denoting their fineness, together with an equal number of extra crowns to match the hats delivered, for \$1,566. A parcel of the goods sold were delivered, but the extra crowns were not delivered. The extra crowns actually delivered did not match the hats sold, and of this immediate information was given to the plaintiffs, and all redress was denied. It cannot be doubted that the defendant sustained a loss, from the circumstance that the extra crowns did not match the hats first delivered; and so far we are of opinion the defendant was entitled to a deduction proportioned to the diminished value, from the price originally agreed upon. Here the defence did not operate as a surprise on the plaintiffs. They well knew that this very point was intended to be insisted upon, and therefore no notice was necessary, (*Beecker and Beecker v. Vroman*, 13 Johns. 302.)

A new trial must, therefore, be granted, with costs to abide the event of the suit.

New trial granted.

*JOHN L. FINK *against* Cox, Executor of A. FINK.

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Cox.

THIS was an action of *assumpsit* brought to recover the amount of a promissory note, given by the testator, *Alexander Fink*, to his son, the plaintiff. The note, which was proved by the subscribing witness, was as follows: "*New-York*, 30th *July*, 1816. Sixty days after date, I promise to pay *John L. Fink*, or order, one thousand dollars, value received. *Alexander* ^{his} *+ Fink*." The testator, at the time he gave the note to the plaintiff, ^{mark} declared that he gave it to him absolutely, and observed that the plaintiff was not so wealthy as his brother; and that the plaintiff and his brother had had a controversy about a stall, &c., which were the reasons for his giving the note to the plaintiff. There was no actual consideration for the note; and the witness understood it to be a gift from the testator to his son.

The defendant gave in evidence the will of the testator, by which he devised all his personal estate to his sons, including the plaintiff, in equal proportions; and after a devise to his daughter of a house and lot, the residue of his real estate was given to his executors in trust, to sell the same, and divide the proceeds equally among his children. The defendant also gave in evidence the plaintiff's answer to a bill in chancery, for a discovery filed by the executor, in which he stated that the note was freely given to him by the testator, and was founded on the consideration of natural love and affection.

The cause was tried at the *New-York* sittings, in *June*, 1818, when a verdict was found for the plaintiff, for \$1,129 and 30 cents, subject to the opinion of the court, on a case containing the above facts.

Van Wyck, for the plaintiff. 1. This was an absolute gift from the testator to the plaintiff, not merely of a written paper, but of the value in money, or the fruits and effects of the note, acknowledging the value received. A chose in action is the subject of a valid gift. (*Atk.* 214.) The plaintiff might have negotiated the note for the amount, which the defendant would have been obliged to pay. The plaintiff had a property in the note, and might have brought trover for it. (2 *P. Wms.* 204. 1 *P. W.* 441. 2 *Leo.* 111. *Cro. Eliz.* 159. 2 *Str.* 955. 2 *Caines*, 246. per *Livingston, J.* 3 *Caines's Rep.* 279. *Chitty on Bills*, 90. 2 *Vesey, jun.* 111. 120. 122. 22 *Viner Abr.* 193. pl. 3.) In *Grangiac v. Arden*, (10 *Johns. Rep.* 293.) where a father gave to his daughter a lottery ticket, which drew a prize, and the father afterwards said, he had given that ticket to his daughter, and the prize money was hers, it was held sufficient to support an action of *assumpsit* by the daughter, against her

A father from affection merely gave to his son, a promissory note for 1,000 dollars, payable to him or order, 60 days after date. In an action of *assumpsit*, brought by the son against the executor of his father, to recover the amount of the note, it was held, that the action could not be maintained: for it was not a *donatio causa mortis*, nor a valid gift of so much money, but a mere promise to give: and blood or natural affection is not a sufficient consideration to support a simple executory contract.

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father, for the amount of the prize money which he had received.

2. Blood or natural affection, among near relations, is a *good* consideration; and is sufficient to support a contract against all persons, except creditors and *bona fide* purchasers. (2 Bl. Com. 444. Plowden, 305.)

Slosson, contra. 1. No doubt, the note, or slip of paper on which the testator's promise was written, was given to the plaintiff; and, to that extent, it was a gift. But the object intended was *money*, not paper; and it is essential to a valid gift, that the identical thing intended to be given, should be actually delivered. In *Grangiac v. Arden*, the lottery ticket was the means of obtaining the prize money from third persons. So, if the testator had delivered to the plaintiff the note of a stranger, it would have been a valid gift, for it was transferring the power to obtain the money. But here was a gift merely of a written promise to pay money at a future day. In *Noble v. Smith*, (2 Johns. Rep. 52.) this court held that an actual and immediate delivery of the thing was essential to a valid gift; for it is not consummate and perfect until a delivery of the thing promised; and, until then, the party may revoke his promise. (7 Johns. Rep. 26.)

2. In *Pearson v. Pearson*, (7 Johns. Rep. 26.) and *Schoonmaker v. Roosa*, (17 Johns. Rep. 301.) it was decided that, *as between the original parties to a promissory note, the consideration might be inquired into, and if there is no consideration for the promise, it is a *nudum pactum*, and cannot be enforced at law. Suppose the plaintiff had sued his father, in his life time, on this note, could he have maintained the action, on the consideration of natural love and affection? Suppose a *parol* promise by a father to his son, before witnesses, to give him a sum of money, can *assumpsit* be supported on such a promise? (*Rann v. Hughes*, 7 Term Rep. 350. n.) In *Tate v. Hilbert*, (2 Vesry, jun. 111.) which was the case of a gift of a *check* on a banker, and a promissory note; the question was, whether it was to be considered as a *donatio causa mortis*, and the chancellor, who held it not to be a gift of that description, doubted whether an action at law would lie against the executor, on the note, for want of consideration; and if not, there could be no relief in equity. (*Thorn v. Deas*, 4 Johns. Rep. 84.)

T. A. Emmet. This was not a *donatio causa mortis*, though intended to be so: and if the action cannot be supported on the note, the testator's intention will be defeated. By giving a note payable to order, he meant that his son should have full power to convert it into money, by negotiating it. If a *moral* obligation will support an express promise, why should not natural love and affection support such a promise? Why is a moral obligation a sufficient consideration to support an express

promise? It is not money or value. It is, because it is just and right that such a promise should be supported. Again; a consideration beneficial to one, or injurious to the other, is sufficient. *Blackstone* (2 *Bl. Com.* 444.) says, the satisfaction arising from natural affection, is equivalent to a benefit. The distinction between a *good* and a *valuable* consideration has grown out of the statute of *uses* and the statute of *frauds*. Independent of those statutes, there is no ground for any such distinction. A *good*, as well as a valuable consideration, prevents the contract from becoming a *nudum pactum*, which is a contract without any consideration whatever. *Plowden* says, that "a consideration proceeding from nature, *is a sufficient consideration in our law;" and a contract founded upon such a consideration cannot be a *nudum pactum*. Why is natural affection a sufficient consideration to support a covenant to stand seised to uses? It is because that, before the statute of uses, it would have been sufficient to raise an use. If blood or natural affection is sufficient consideration to raise an use, in regard to land, because it is not a *donum gratuitum*, why is it not sufficient to support a promise to pay money?

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SPENCER, Ch. J., delivered the opinion of the court. The question in this case is, whether there is a sufficient consideration for the note on which this suit is founded. It appears from the declaration of the testator when the note was given, that he intended it as an absolute gift to his son, the plaintiff; alleging that the plaintiff was not so wealthy as his brothers, that he had met with losses, and that he and his brothers had had a controversy about a stall. Such were the reasons assigned for his giving the note to the plaintiff.

There can be no doubt that a consideration is necessary to uphold the promise, and that it is competent for the defendant to show that there was no consideration. (17 *Johns. Rep.* 301. *Schoonmaker v. Roosa and De Witt*.) The only consideration pretended, is that of natural love and affection from a father to a child; and if that is a sufficient consideration, the plaintiff is entitled to recover, otherwise not.

It is conceded, that the gift, in this case, is not a *donatio causa mortis*, and cannot be supported on that ground. In *Pearson v. Pearson*, (7 *Johns. Rep.* 26.) the question was, whether the gift of a note signed by the defendant to the plaintiff was such a vested gift, though without consideration, as to be valid in law; we held that it was not, and that a parol promise to pay money, as a gift, was no more a ground of action, than a promise to deliver a chattel as a gift; and we referred to the case of *Noble v. Smith*, (2 *Johns. Rep.* 52.) where the question underwent a full discussion and consideration. The case of *Grangiac v. Arden*, (10 *Johns. Rep.* 293.) was decided on the principle, that the *gift of the ticket had

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been completed by delivery of possession, and is in perfect accordance with the former cases.

It has been strongly insisted, that the note in the present case, although intended as a gift, can be enforced on the consideration of blood. It is, undoubtedly, a fair presumption that the testator's inducement to give the note sprang from parental regard. The consideration of blood, or natural love and affection, is sufficient in a deed, against all persons but creditors and *bona fide* purchasers; and yet there is no case where a personal action has been founded on an executory contract, where a consideration was necessary, in which the consideration of blood, or natural love and affection, has been held sufficient. In such a case, the consideration must be a valuable one, for the benefit of the promisor, or to the trouble, loss, or prejudice of the promisee. The note here manifested a mere intention to give the one thousand dollars. It was executory, and the promisor had a *locus penitentiae*. It was an engagement to give, and not a gift. None of the cases cited by the plaintiff's counsel maintain the position, that because a parent, from love and natural affection, engages to give his son money, or a chattel, that such a promise can be enforced at law.

Judgment for the defendant

The COLUMBIAN INSURANCE COMPANY against BLACK.

One of three joint owners of a vessel effected insurance on the freight, in his own name, for account of the owners, by a valued policy, on which there was a total loss, and notice of abandonment was duly given, with the usual proofs of interest and loss; but no adjustment made: Held, that he might set off this loss in an action brought against him by the insurers, for premiums due to them on other policies of insurance.

THIS was an action of *assumpsit* on a promissory note, against the defendant as endorser. The note was made by *John Graham & Co.*, dated the 11th of *February*, 1813, for *\$8001 dollars and 23 cents, payable to the defendant or order, nine months after date, and endorsed by him to the plaintiffs. The defendant pleaded the general issue, and gave notice of a set-off of several sums, and, also, of the further sum of 11,428 dollars, for a total loss of freight of the schooner *Dick*, insured by the plaintiffs, and of which they had notice, proof, &c. The cause was tried at the *New-York* sittings, in 1815.

It appeared, that the plaintiffs underwrote a policy of insurance, dated the 11th of *February*, 1813, in the name of the defendant, for the owners of the schooner *Fanny*, on freight, valued at the sum insured, on a voyage from *Charleston* to *Nantz*, at 50. per cent. premium, to return 10 per cent. if the voyage ended without loss. The sum subscribed was 20,000 dollars, and the note for the premium, with the charge of policy, was 10,001 dollars and 25 cents. The risk ended safely, and without loss; and on the 28th of *May*, 1813, an adjustment of the return premium was made, and the policy canceled, when a new note was made and endorsed by the

same parties, for 8,001 dollars and 25 cents, being the balance, after deducting the return premium; the note was dated the same day as the original premium note, made payable nine months after date, and became due the 13th of *November*, 1813, when it was protested for non-payment.

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After the note was proved, and read in evidence, the defendant, to show a failure of consideration, arising from a fraudulent concealment, by the plaintiffs, of their being insolvent at the time they underwrote the policy of insurance, so that, had a loss happened, the assured would not have been able to recover the amount, introduced a number of witnesses, whose testimony it is unnecessary to state.

The defendant, to support his notice of *set-off*, then gave in evidence a policy of insurance, dated the 11th of *February*, 1813, underwritten by the plaintiffs, on the freight of the schooner *Dick*, valued at 20,000 dollars, for the defendant, for account of the owners, for a voyage at and from *New-York* to *Bourdeaux*, at a premium of 30 per cent., to return two and a half per cent, if the risk ended without loss, the sum subscribed by the plaintiffs being 11,428 dollars. *It was proved, that the *Dick* sailed on the voyage insured, and was totally lost by *British* capture. The defendant, at the same time, gave his note for the premium, being 3,429 dollars and 65 cents, which remained unpaid. It appeared, that the defendant, and *William Minugh* and *John Minugh*, were the owners of the *Dick*; and it was admitted, that the defendant had duly abandoned to the plaintiffs, and exhibited to them the usual proofs of interest and loss on the 13th of *May*, 1813.

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A verdict was taken for the plaintiff, subject to the opinion of the court on a case containing the facts above stated.

There were four suits brought by the same plaintiffs, on two notes given for the premiums on two policies of insurance: Two suits on the note above-mentioned, one against *John Graham & Co.* as makers, and *Black* as endorser: and two suits on the other note, dated 11th *February*, 1813, for 3,734 dollars and 49 cents, made by *Black*, payable nine months after date to *John Graham & Co.*, and endorsed by them.

The case was argued in *May term*, 1819, by *T. A. Emmet* and *S. Jones, jun.* for the plaintiffs, and *Griffin* and *Slosson* for the defendant.

For the plaintiffs, it was contended, that the *set-off* was not admissible, and that they were entitled to judgment for the full amount of the note, with interest. But if, however, the *set-off* should be allowed, it could only be in one of the suits; for having been once applied, there must be an end of it.

Unliquidated damages cannot be set off. (*Brown v. Cumming*, 2 *Caines's Rep.* 33. *Gordon v. Bowne*, 2 *Johns. Rep.* 150. *Lyle v. Clason*, 1 *Caines's Rep.* 313.) The demands in cases of *set-off* must be certain as well as mutual. In *Gor-*

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don v. Bowne the court said, that a total loss on an open policy of insurance could not be set off. Though the freight was valued in this case, it can make no difference in the principle. It merely ascertains the amount of the interest of the insured ; and leaves all the other questions which may arise on the policy open and undetermined. *The statute goes only to cases of *mutual debts*, (*Colson v. Welsh*, 1 *Esp. N. P. Cases*, 379, 380.) such as an action of *indebitatus assumpsit* would lie for. The subject lost, or vessel, belonged to three persons ; and can a joint demand of the three owners be set off against a suit on the note of one of them ? A joint demand cannot be set off against a separate one. In *Murray & Ogden v. The Columbian Ins. Co.* (11 *Johns. Rep.* 302.) the court decided, that where one of several owners of a ship insures the whole of her, or to her full value, in his own name, in case of a loss, he can recover only his aliquot part or share ; and he must prove the quantum of his interest, or he cannot recover any thing. Suppose all the owners should sue on the policy, could the plaintiffs set off a note given by one of them, for half the amount ? The present is an attempt to narrow the rule, that joint demands cannot be set off against a separate suit. The set-off must be mutual, and between parties suing in their own rights. But the set-off here can only be applied in one of the suits ; and if there is more than enough to meet the demand in one action, the court, according to the statute, must give judgment for the balance in favor of the defendant. The set-off cannot be divided and applied to different suits.

For the defendants, it was contended, that a claim for a total loss, on a valued policy, is as certain as a promissory note, or any other contract, as to which the party would be always at liberty to contest the right of recovery, on the ground of fraud, &c. The amount due is as easily ascertained in the one case as in the other ; *id certum est quod certum reddi potest*. It is true, that the total loss must be proved ; so must the defendant prove a note which he offers to set off. The court, in *Gordon v. Bowne*, refused to allow the set-off, because the claim was on an open policy ; but they thereby impliedly admit, that if it had been a valued policy, the set-off might have been allowed. The equity and justice of the case is most strongly in favor of the right of set-off, as the plaintiffs are notoriously, if not confessedly, insolvent. But it is objected, that the amount of loss to be set off is due to the defendant and the other *owners of the vessel jointly. The criterion is, who has the right to bring the action for the demand. If the defendant has a right to sue in his own name, for the demand which he seeks to set off, he may set off that demand by way of defence. Now the policy is in the name of the defendant, and he has an interest in it. He may, therefore, bring an action in his own name, without joining the other persons beneficially interested. (*Park on* 122

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Ins. 543. 1 *Burr.* 489.) In *Simpson v. Hart*, (14 *Johns. Rep.* 63.) the Court of Errors decided, that where *A.* had recovered a judgment against *B.* and *C.*, for an assault and battery, and *B.* had recovered a judgment against *A.* for an assault and battery, that *A.*'s judgment might be set off against the judgment recovered against him by *B.* A surviving partner may set off a partnership debt, in a suit on a demand against him individually. So if a firm be carried on in the name of one person, a separate debt due from that person may be set off against an action by the partners. (1 *Exp. N. P. Cases*, 47. 5 *Term Rep.* 493. 6 *Term Rep.* 582. 2 *Term Rep.* 32. 7 *Term Rep.* 359. 2 *Exp. N. P. Cases*, 269. 10 *Johns. Rep.* 396.) In *Parker and others v. Beasley and others*, (2 *Maule and Selwyn's Rep.* 423.) the Court of K. B. decided, that where brokers effected policies in their own names, on account of their principals, and had a lien on the policies, by reason of their acceptance of bills drawn on them by their principals, on account of goods consigned to them, and totally lost before their arrival, they might set off the losses in an action brought against them for the premiums, though the losses had not been adjusted. (*Koster v. Eason*, 2 *Maule & Selw. Rep.* 112.) A surety is entitled to the same defence as his principal. (*Phoenix Ins. Co. v. Fiquet*, 7 *Johns. Rep.* 183.)

As to the objection that the set-off can be applied in one of the suits only, and that judgment for the balance is to be given in favor of the defendant against the plaintiffs; all the cases being before the court, if the set-off is allowed, the court will consider it as relating back so as to extinguish the debt prior to the suit. It is but one debt, and the parties are sureties for each other. The set-off relates back, as a payment, to the time when the right of *set-off accrued. (*Chitty on Bills*, 254. 1 *Str.* 515. 1 *Wils.* 46.)

Cur. adv. vult.

SPENCER, Ch. J., delivered the opinion of the court. This suit is on a premium note on a policy, underwritten by the plaintiffs, on the schooner *Fanny*, on the 11th of February, 1813. The insurance was effected by the defendant, for the owners of the *Fanny*, and the voyage ended safely.

The first objection to the plaintiffs' recovery is, that there was a failure of consideration for the note. It has been urged, that the company was insolvent when they underwrote the policy, and that, therefore, had a loss taken place, the assured would have had no indemnity, and that, under these circumstances, it was a fraud and imposition on the assured, to assume the risks. It appears that the company was much involved when this policy was effected; but the better conclusion is, that, according to their ideas of their concerns, they were then solvent. Their solvency depended on the event of the risks they had assumed; if they turned out favorably, they would be solvent. The evi

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dence will not authorize the conclusion that the company was then insolvent, or that their conduct in making the insurance was fraudulent.

The defendant offered to set off the amount of a loss on a valued policy, underwritten by the plaintiffs, on the 11th of *February*, 1813, on the freight of the schooner *Dick*; and it was proved, that the plaintiffs, at the time last stated, had insured for the defendant, on account of the owners of the schooner *Dick*, \$11,428, valuing the freight at \$20,000, at a premium of 30 per cent. It was proved, that the *Dick* sailed on the voyage insured, two days after the date of the policy, with a full cargo, and that, on the 17th of *March* after, she was captured and sent into *Plymouth* as a prize, war then existing between the *United States* and *Great Britain*. The *Dick* was owned by the defendant, and *William* and *John Minugh*. The defendant made an abandonment, and exhibited the usual proofs of interest and loss.

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*The case of *Gordon v. Bowne*, (2 *Johns. Rep.* 150.) has been relied on as an authority against the set-off. That was an attempt to set off a loss on an open policy, and *Kent*, Ch. Justice, observed, that the extent of the loss and the extent of the interest must always be matter of great uncertainty, until the proofs have been exhibited and passed upon by a jury. He said it was a contract of indemnity, and nothing could be more unliquidated than the amount of such indemnity. The facts in the present case are simple and few, and are not calculated to produce a perplexed inquiry. The liquidation of damages depends on the sailing of the vessel with a cargo, and her loss by a peril insured against. A set-off here promotes justice, and prevents litigation; and no case can come before the court, in which the injustice of denying the set-off would be more glaring.

It cannot be seriously doubted that the defendant alone could sustain a suit for the loss. It was an insurance for him, on account of the owners of the schooner. The contract is between these parties; and although all the owners might unite in a suit, the defendant is competent to sue alone. Were it necessary for the defendant to prove the extent of his interest, he could not alone maintain the suit, but this not being necessary in a valued policy, he can sue alone; and then, the principle applies, that if the legal or equitable claims or liabilities become vested in one person, they may be set off against separate demands, and so *vice versa*.

The case of *Parker and others v. Beasley & Bell* (2 *Maul. & Sel.* 423.) is a strong authority for the defendant, on both points. The defendants were sued for premiums of insurance, and, at the trial, offered to set off the losses on two policies of insurance underwritten by the bankrupt, whose assignees the plaintiffs were. The defendants effected the policies in their own names; but persons resident in this country were propri-

etors, in different proportions, of the cargo. Lord *Ellenborough* (and the other judges concurred) decided, that the policies being effected in the name of the brokers, on account of other persons, the brokers could maintain an action in their own names, if they had any lien on the policies; and, by subscribing to policies in their own *names, the underwriters had consented, that they might stand in the character and situation of principals. Here, the defendant has a lien on the policy, independent of his interest; he gave his note for the premium. In the case last cited, it was not objected, that the loss on the policy could not be set off; but it was agreed on all hands, that it could be done, if the defendants had a right to avail themselves of the policy. We are of opinion, therefore, that there must be judgment for the defendant, for the excess of the loss over the amount of the note on which this action is brought.

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Woodworth, J., was not on the bench when the cause was argued.

Judgment for the defendant. (a)

(a) In *Bamford v. Harris*, tried before Lord *Ellenborough*, (1 *Starkie's N. P. Rep.* 343.) it was decided, that where, by the custom of the hat trade, the amount of the injury sustained by the hats in the process of dying, is deducted from the charge for dyeing, the defendants might, in an action against him by the dyer, set off his claim for the damage in the dyeing, though there was no notice of the set-off, and though the amount of the damage had not been previously ascertained or adjusted. In *Barker v. Langham*, (6 *Taunt.* 519.) though *Gibbs*, Ch. J., seemed inclined not to allow an insurance broker to set off a loss on a policy of insurance, effected in his own name, as agent merely, against an action brought by the assignees of the insurer, a bankrupt, for premiums; yet he appears to have entertained no doubt, that if the suit had been against the assured, or the original debtor himself, the claim of a total loss on a policy of insurance, underwritten by the plaintiff, might be made.

Though *KENT*, Ch. J., in *Gordon v. Bowne*, says, that the words *mutual debts* in the *English* statute, (2 *Geo. II. ch. 22. s. 13.*) and the words of the act of the 30th of *March*, 1801, (sess. 24. ch. 90.) "*dealing together*," and being "*indebted to each other*," are of the same import, and that the *English* decisions, upon the construction of their statute, are, therefore, to be applied to the construction of our act; yet, in the late revised act, passed the 5th of *April*, 1813, (1 *N. R. L.* 515. sess. 36. ch. 56. Vide 2 *Rev. Stat.* 354.) where the words are, "if two or more persons dealing together, be indebted to each other, or have demands arising on contract or credits against each other," &c., the legislature must have intended, by these additional words introduced, to have given a greater extension to the law of *set-off*: or, at least, to remove any doubts which may have existed as to cases being within the meaning of the former act, or of the *English* statute, according to the settled construction of it. (*Duncan v. Lyon*, 3 *Johns. Ch. Rep.* 351. 360. 573. 575.) They have a broader meaning than the words *mutual credit*, used in the statute of 5 *Geo. II. ch. 30. s. 28.* in regard to *bankrupts*, and in our insolvent act. (Sess. 36. ch. 98. s. 20. 1 *N. R. L.* 469.) 2 *Rev. Statutes*, 354.

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TROVER for 7,500 bushels of salt, tried before Mr. Justice *Van Ness*, at the *New-York* sittings, in *December*, 1816.

The right to retain goods for the freight

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grows out of the usage of trade; and does not exist where the parties have, by their agreement, regulated the time and manner of paying the freight, especially where the cargo is to be delivered before the time fixed for the payment of the freight.

The legal property in goods passes by a bill of lading, and an assignment thereof, *bona fide*, and for a fair consideration, though the assignment be made after the

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arrival of the goods in port: and where the ship owner, not having a *lien* for the freight, sold the goods at auction to pay freight, it was held to be a conversion of them, and that trover would lie at the suit of the person to whom the bill of lading was assigned.

From the evidence stated in the case, it appeared that, on the 11th of July, 1815, *Clark & Ingersoll*, and *Luther Bingham*, entered into a written agreement with the defendant, by which they agreed to put on board the ship *Carrier*, at *Turk's Island*, fifteen thousand bushels of salt, or as much as the ship could carry, at the freight of 35 cents per bushel, 500 dollars to be paid in advance, and the balance in three equal payments, at 30, 60, and 90 days, from the arrival of the vessel at quarantine, in *New-York*: and *C. & I.* and *B.* agreed to receive the salt, in fifteen days after the arrival of the vessel at the dock, in the port of *New-York*. The five hundred dollars were paid to the defendant in advance. The master of the *Carrier* executed a bill of lading, dated in *Turk's Island*, the 6th of *November*, 1815, for ten thousand nine hundred and forty-seven bushels of salt, to be delivered at *New-York*, to *Luther Bingham*, or his assigns, "he or they paying freight for the same as per agreement." This bill of lading was endorsed by *Bingham* to the plaintiffs; the endorsement was dated *November 24th*, 1815, but there was contradictory evidence as to the time of the assignment. From the entries in the books of the plaintiffs, as well as the evidence of some of the witnesses, it must have been in *December*, and some time between the fifth and twentieth day of that month. A witness for the plaintiffs testified, that they had purchased of *Bingham* six thousand bushels of salt, about the 26th of *November*, *when they paid him 1,600 dollars in advance. The vessel arrived the 22d of *November*, 1815. *Clark & Ingersoll*, who were to have one half of the salt, received five thousand bushels, which was more than half, as the cargo turned out only eight thousand eight hundred and eighty bushels; *Bingham* had given an order on the captain, in favor of *Wm. Dodge & Sons*, for two thousand bushels, which was accepted by the master, on the 29th of *November*, a part delivered on the 1st of *December*, and the residue between the 11th and 14th; the delivery having been interrupted by a seizing of the vessel, on the 2d of *December*, under a bottomry bond, which was paid on the 5th of *December*. The defendant resided at *Hartford*, in *Connecticut*, and came to *New-York* on the 4th or 5th of *December*. There was some contrariety of testimony as to the time when the plaintiffs presented the bill of lading, and demanded the salt. The weight of evidence was, that a demand was made of six thousand bushels of salt, of the measurer on board of the vessel, on the 9th of *December*, and of the mate, the captain being absent, and refused. After the delivery of the salt to *C. & I.* and to *D.*, being seven thousand bushels, *Clark & Ingersoll* directed the agent of the defendant to retain the residue of the cargo for the payment of the freight, which, according to the agreement, amounted to 3,108 dollars. The residue of the salt was sold at auction, and produced 1,179 dollars and 45 cents; it was purchased by the agent of the defendant for his

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account. One of the witnesses testified, that a demand of the salt was made by the plaintiffs, from the defendant, about two days after the arrival of the vessel, which was refused; the defendant saying that *C. & I.* were insolvent, and *Bingham* a bankrupt, and that he would not deliver the salt, unless the freight was paid or secured to him, and that the plaintiffs declined paying or securing the freight. The assignment of the bill of lading to the plaintiffs was absolute, and for a full consideration. *William Clark*, one of the firm of *Clark & Ingersoll*, was offered as a witness by the defendant, but he was rejected by the judge. It appeared that *Bingham's* notes were protested at the bank, for non-payment, on the 24th of *November*, and his bonds at the custom-house were unpaid.

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*The judge charged the jury: 1. That, admitting the insolvency of *Bingham*, the defendant, under his agreement, had no lien on the cargo for the payment or security of the freight; 2. That the defendant's remedy was good against *C. & I.*, who did not appear to be insolvent: 3. That the property having passed by the assignment of the bill of lading, the plaintiffs were entitled to recover: 4. That the only question was as to the quantity; and as *Bingham's* part was only claimed, if the endorsement of the bill of lading was made at any time before the 8th of *December*, the plaintiffs had a right to recover *B.'s* share, unless they had consented to the delivery of the salt to *Dodge*: 5. That the demand by the plaintiffs, on the 9th of *December*, was sufficient; and the captain was not then on board. Admitting that the defendant was not in *New-York* until the 4th of *December*, which he thought was established by the testimony, yet the circumstances would justify an inference of a demand made after that time of the defendant. The jury found a verdict for the plaintiff, for the 1,880 bushels of salt, viz: 1,519 dollars and 34 cents.

A motion was made to set aside the verdict, and for a new trial.

Hoffman, for the defendant. 1. The endorsement of the bill of lading having been made after the vessel had arrived in port, and when there might have been an actual delivery of the salt, did not transfer the property to the plaintiffs. The endorsement or transfer of a bill of lading merely passes the property in goods *at sea*, when there can be no actual delivery of them. Such an assignment transfers only an equitable right of possession; and the assignee must get the actual possession of the goods, as soon as possible. The principles of law on this subject are clearly laid down by Mr. Justice *Buller*, in the opinion delivered by him in the case of *Lickbarrow v. Mason*, in the House of Lords. (6 *East*, 21. in note.)

2. The defendant was not bound to deliver the salt, until the freight was paid, or secured to him. To maintain *trover*, the plaintiffs must show an absolute legal property in the goods.

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If there was any conversion at all by the defendant, *it was before the assignment of the bill of lading, which merely transferred a right of action. The assignment was not, in fact, made before the 19th of *December*; for there was no consideration paid before that time. But, admitting that the assignment transferred the right of property, it must be subject to all legal claims against the assignor, in respect to the property. When the original agreement was made, *C. & I.* and *B.* were solvent; but when the goods arrived, *B.* was insolvent, and that fact was known to the plaintiffs when they took the bill of lading. The plaintiffs, therefore, can stand in no better situation than *B.* himself would have done; and he would never be allowed to take the goods out of the possession of the ship owner, without paying the freight. (*Hutton v. Bragg*, 2 *Marsh. Rep.* 339.) The agreement contemplates the solvency of *C. & I.* and *B.*; and the doctrine as to the right of stoppage *in transitu*, may be applied in this case. Though there was an agreement on the part of the owners of the goods, that they would *receive* them in fifteen days after the arrival of the vessel at the dock, yet there is no contract on the part of the defendant that he would, at all events, *deliver* them within that time. The master, or ship owner, is not bound to part with his *lien* on the goods, unless there is an express stipulation to that effect.

3. *C. & I.* and *B.*, who were joint owners of the cargo, directed the residue to be sold for the payment of the freight. Now, if the transfer of the bill of lading was subsequent to this direction, there is an end of the case.

4. The endorsement of the bill of lading was fraudulent. It was antedated, and was not made until after the sale or conversion. (Here the counsel discussed the evidence in the case.)

5. There was not evidence of a sufficient demand and refusal. The only demand was on the 9th of *December*, and that made of a *measurer*, an officer of the custom-house, without showing any paper or permit. The demand should have been made of the master, or of the defendant, who was then in the city. The mate is not the agent of the owner. The measurer has no power to deliver, without an order or permit from the custom-house.

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*6. *Clark* was a competent witness, as he stood indifferent between the parties.

Wells, contra. Whether the assignment of the bill of lading transferred the property in the goods or not, is immaterial in the present case, as here was an actual and *bona fide* sale of the property to the plaintiffs, independent of the transfer of the bill of lading. If there was an absolute sale, the plaintiffs have a sufficient right of property to maintain trover. But, ever since the case of *Lickbarrow v. Mason*, it has been the
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settled law, that a bill of lading is transferable like a promissory note; and when endorsed, *bona fide*, transfers the legal title to the goods. Not an exception to this rule has been shown. In *Judah v. Kemp*, (2 Johns. Cases, 411.) there was an assignment of the bill of lading after the arrival of the goods; yet the distinction which has been suggested did not occur to the counsel, or the court, in that case. The true time of the endorsement of the bill of lading was a matter of fact for the jury to decide, and they have decided upon it. In *Hollingsworth v. Napier*, (3 Caines's Rep. 182.) where the vendee had a bill of parcels, and an order from the vendor, on the storekeeper, for the delivery of the goods to him, this was held a sufficient delivery to destroy the right of stoppage *in transitu*, as against the *bona fide* purchaser, for a valuable consideration. *Bingham* was the sole consignee of the cargo of salt. He had a legal title to the whole; but the plaintiffs claim only the half belonging to *B*. If the plaintiffs are entitled to recover at all, they have recovered the least possible quantity.

The only question in the cause is, as to the right of the defendant to retain the goods until his freight is paid. This right grows out of the usage of trade, and is created by law; but when the parties make a special agreement for the payment of freight, no legal *lien* exists. The contract shows that the freight was not to be paid until long after the delivery of the goods.

SPENCER, Ch. J. We are satisfied that there was no *lien* in this case.

**Hoffman*. But the insolvency intervening materially alters the case.

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Wells. But the parties should have provided against the contingency of insolvency. If they have not, they can look only to the personal responsibility of the shippers. Third persons are not to be affected by that circumstance. But there is no evidence of the insolvency of *C. & I.*, and not very clear proof that *B*. had become insolvent, though he may have been in failing circumstances. As to the sufficiency of the demand, the salt was in the actual course of delivery, and the demand was necessarily made on board of the vessel, and of the person who had charge of the vessel, and the special custody of the property, in the absence of the master, and whose peculiar duty it was to see to the delivery of the cargo. Besides, the defendant merely claimed to retain for freight; he made no objection to the want of authority in the plaintiffs to receive the salt.

Clark was clearly an incompetent witness; he was interested with *I.* in the original adventure, and *C. & I.* had made

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themselves liable for the whole freight; *C.* was interested, therefore, to diminish the amount of that liability.

SPENCER, Ch. J., delivered the opinion of the court. 1. The defendant had no lien on the salt for the freight. By the charter-party, 500 dollars was to be paid immediately, and it was paid. The balance of the freight was to be paid in three equal payments, at thirty, sixty, and ninety days from the arrival of the vessel at quarantine in the port of *New-York*; and *Clark, Ingersoll* and *Bingham*, the owners of the salt, stipulated to receive the salt in fifteen days after the arrival of the vessel at the dock in *New-York*. The right to retain the cargo for the freight has grown out of the usage of trade, and it does not exist, nor can it be enforced, when the parties have expressly regulated the time and manner of paying freight, by stipulations in a charter-party, and especially, if the cargo is deliverable before the arrival of the periods of payment. Such an agreement is an express renunciation *of the right to insist on freight before the cargo is delivered. (*Com. on Contracts*, 359, 360. *Doug.* 104. *Abbot*, 228. 259.) It is very manifest, in this case, that the defendant meant to waive the right of lien.

2. Had the plaintiffs a legal title to any portion of the salt?

It cannot admit of a doubt that the assignment of the bill of lading, *bona fide*, and for a fair consideration, will vest the legal interest of the consignee in the assignee, although the assignment be made after the arrival of the goods. Such assignment amounts to a sale and delivery, and cannot be impeached by the carrier of the goods, who has no lien on them, nor any interest in questioning the validity of the transaction. The evidence in the case furnishes full proof of an adequate consideration for the assignment of the bill of lading, although it remains very doubtful when, in point of fact, the assignment was made. The plaintiffs have recovered only for 1880 bushels of salt, and have thus affirmed the delivery to *Clark & Ingersoll* of 5000 bushels, and to *Dodge* of 2000 bushels, as a legal delivery, and have only made the defendant answerable for what remained. It is not then material to inquire on what particular day the bill of lading was assigned. That it was assigned some time in *December*, 1815, cannot be controverted.

If the defendant had not a right to retain the cargo for the freight, on what ground can he be justified in doing it? It is alleged that *Kimberly*, the defendant's agent, proved that he was directed by *Clark & Ingersoll* to retain and sell the residue of the cargo for the payment of the freight. It appears that *Clark & Ingersoll* and *Bingham* entered into the charter-party as parties of the one part, with the defendant. The whole cargo was consigned to *Bingham* alone. He was, therefore, the ostensible and legal owner. It is, however, shown, that *Clark & Ingersoll* were entitled to one half of the cargo, and

they took more than their proportion. This was a surrender of their interests; and they had no right or authority to direct *Bingham's* part of the cargo to be sold. The sale itself amounted to a conversion; and if it remained doubtful whether there had been a legal demand of the salt whilst it was on board the vessel, the act of sending the *salt to auction, which is certainly chargeable on the defendant, would be a conversion; and, at that time, the plaintiffs indisputably had a legal right to the salt.

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Motion denied.

The PEOPLE against DANIEL FLANDERS.

The SAME against SAMUEL HAUY.

THE prisoners were indicted, tried, and convicted, at the last Court of Oyer and Terminer and Gaol Delivery, in *Rensselaer* county, for the forgery of a deed of land, described as situated in the territory of *Missouri north*. The presiding judge considering the cases proper for the consideration of the court, no judgments were given, and the prisoners and the records of conviction were, accordingly, brought up to this court.

Forging a deed within this state, for lands lying in the *Missouri* territory, or in another state, is an offence indictable and punishable under the acts to prevent forgery; and declaring the punishment of crimes. (1 *N. R. L.* 405, 408 2 *Rev. Statutes*, 670. § 22.)

Cady, for the prisoners. By the act to prevent forgery, (1 *N. R. L.* 405. sess. 36. ch. 44.) and the act declaring the punishment for certain crimes, (sess. 36. ch. 27. s. 41. *N. R. L.* 408.) every person who shall be duly convicted of falsely making, altering, forging, or counterfeiting any deed affecting the title to real estate, with intention to defraud any person, or body politic or corporate whatsoever, or of uttering and publishing, as true, any false, altered, forged or counterfeited deed, affecting the title to real estate, with intention to defraud any person, or body politic or corporate whatsoever, knowing the same to be false, altered, forged, or counterfeited, shall be punished with imprisonment for life in the state prison, or for such term as the court may, in their discretion, deem proper. These statutes must be deemed to have been passed for the protection of titles to lands in this state. Our legislature have no jurisdiction or authority as to lands in other states. Although there are no words in *these statutes expressly confining their operation to the forging of deeds affecting titles to lands in this state, yet that is the natural and necessary implication, unless otherwise expressed. The statute of 5 *Eliz. c. 14.* as to forging deeds, has been adjudged not to extend to the forging a lease or deed of lands in *Ireland*. (1 *Hawk. ch. 70. s. 20.* 2 *Hale, P. C.* 694. *East, C. L.* 921. 3 *Leo.* 170.)

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M Manus, (D. A.) contra. Forgery, like other crimes, must be tried where the crime is committed. If a person in *Massachusetts* forges a deed for lands in this state, he cannot be punished at all, if the doctrine contended for by the prisoners' counsel is to prevail. It is immaterial where the lands are; the essence of the offence is the fraud attempted to be practised within this state, and upon our own citizens. The relation existing between the different states is very different from that which existed between *England and Ireland* at the time when the case in *Leonard* was decided.

SPENCER, Ch. J., delivered the opinion of the court. The question presented by the record is this, whether, as the lands in relation to which the forgery has been committed, are without this state, the offence is within the statute to prevent forgery and counterfeiting. (1 R. L. 404. 2 Rev. Stat. 670.) The statute, so far as relates to this offence enacts, that if any person shall falsely make, alter, forge or counterfeit any deed or writing sealed, with intention to defraud any person, or body politic or corporate whatsoever, or shall utter and publish the same as true, knowing the same to be false, altered, forged and counterfeited, then every such person, being thereof convicted according to the due course of law, shall be deemed guilty of felony. The act declaring the punishment of certain crimes, (1 R. L. 408. 2 Rev. Stat. 670.) authorizes the punishment for such offences.

The prisoners' counsel have referred us to 3d *Leonard*, 170. as an authority, that the offence is not within the statute. In that case, a complaint was made to the star chamber that a lease of lands in *Ireland* had been forged, and a reference was made to the two chief justices of the points of law arising in the case. They reported it as their opinion, that it was not a forgery within the statute of 5th *Eliz. ch. 14.* That *statute is general, and includes any false deed, charter or writing sealed. *East*, (2 C. L. 921.) in noticing that case, says, "The forgery of a lease of lands in *Ireland* is said not to be within this statute, but punishable as a misdemeanor at common law. *Hawkins* (ch. 70. s. 20.) merely states the position, and refers to the case in *Leonard*. No other case is to be found; at least, neither the researches of the counsel, nor of the court, have discovered any other, affirming or denying the principle. We cannot recognize the authority of the case in *Leonard*; neither the character of the court in which the question originated, nor the manner adopted to ascertain the law, by a reference to two of the judges, before whom no argument took place, as we are informed by the reporter, are entitled to our respect. The essence of the crime of forgery consists in the intention to defraud a person. Thus, it has been held to be forgery to antedate a deed by the person who executes it, with the fraudulent intention that such antedated

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deed shall take preference of another deed of the same lands actually first executed. So, also, it has been held to be forgery to erase the description of the lands conveyed, and insert other lands conveyed to another person, subsequently to the first deed, with intention to defraud such person. In these cases, the forgery consists altogether in the fraud attempted to be effected; for it is perfectly innocent to ante-date a deed, or to alter it with the consent of the grantee, if no other person be affected, or injured thereby. *Chitty (C. L. vol. 3. 799.)* says, the mere imitation of another's writing, the assumption of a name, or the alteration of a written instrument, when no person can be injured, do not come within the definition of the offence. How, then, can it be material, where the lands lie, if the act of forgery, and the existence of the fraudulent intention, both concur and happen within the state? Most clearly, the prisoners have committed no offence cognizable by the laws of *Missouri*; the *corpus delicti* is here, and here the prisoners are punishable, or no where. It seems to me that the admission that the offence may be punished as a misdemeanor here, yields the whole question. It can only be punished as an offence against our laws; and if it can be noticed at all, we must notice it as a forgery. The *forgery of bank bills issued by the banks of other states, when they are forged, or uttered, within this state, *scienter*, have been punished as offences within our statute, for a series of years, and without any doubt of our right to do so. The statute, with regard to these offences, contains the same general words. We have considered these offences, when committed here, as punishable under the statute, on the sole ground, that they were frauds upon our own citizens; and we perceive no difference in principle between the present case and such forgeries. In every view in which the case can be put, we are satisfied that, inasmuch as the fact of forgery was committed here, with the intention charged, to defraud a citizen of this state, it is immaterial that the lands intended to be conveyed by the forged deed were situate without the state.

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Judgment accordingly. (a)

(a) *Haury* was sentenced to the state prison for 14 years, and *Flanders* for seven years.

MYERS against J. D. PALMER and L. PALMER.

THIS was an action of *assumpsit*, brought by the plaintiff, as endorsee, against the defendants, as first endorsers of a promissory note, made by *Parley Rice*, dated the 2d of *March*, 1819, for 4,000 dollars, payable sixty days after date, to the

The plaintiff requested the defendants and *R.*, to lend him their names to a note for 2,000

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dollars, for the purpose of raising money for the accommodation of the plaintiff; and

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it was agreed that *R.* should make a note for 2,000 dollars, payable to the defendants, to be endorsed by them; and the defendants, accordingly, endorsed a blank paper, which the plaintiff, without the privity or consent of the endorsers, procured *R.* to fill up with a note for four thousand dollars: *Held*, that *D.*, a subsequent endorser, and the maker, were competent witnesses to prove the fraud in the filling up of the note

defendants, or order. The note was also endorsed by *Robert Dingee*. At the trial, before Mr. Ch. Justice *Spencer*, at the Dutchess circuit, in August, 1819, the defendants called *Dingee*, the second endorser, as a witness, who was objected to, but the objection was overruled by the judge. He testified, that the plaintiff and *Rice* applied to the witness to endorse a note for 2,000 dollars, to enable the plaintiff to raise money for his own accommodation. The witness, at first, declined; but the plaintiff told the witness that, if he would endorse the note, the defendants would also endorse *it; after much conversation and persuasion, the witness and the defendants agreed, without any consideration, to lend the plaintiff their names, by endorsing a note to be drawn by *Rice* for 2,000 dollars. They accordingly endorsed their names upon a blank paper, and delivered it to *J. D. Palmer*, to have it filled up with a note for 2,000 dollars. The plaintiff, without the privity or consent of the endorsers, persuaded *Rice* to draw the note for 4,000 dollars. *R.*, the maker, was also called as a witness, and was objected to; but the objection being overruled, he testified to the same facts. Several other witnesses were, also, produced on the part of the defendants. The plaintiff submitted to a nonsuit, with leave to move the court to set it aside, upon a case to be made.

The cause was submitted to the court without argument, upon a statement of the points and authorities.

Per Curiam. It is not objected that the witnesses were incompetent, on the ground of interest; but it is insisted that this case comes within the rule established in *Walter v. Shelly*, (1 Term Rep. 296.) and which has been adopted by this court; (*Winton v. Saidler*, 3 Johns. Cases, 185. *Coleman v. Wise*, 2 Johns. Rep. 165. *Baker v. Arnold*, 1 Caines's Rep. 253. *Woodhull v. Holmes*, 10 Johns. Rep. 231. *Skilding* and another v. *Warren*, 15 Johns. Rep. 270.) to wit, that the party to a promissory note, as maker or endorser, shall not be admitted to impeach the original validity of the note to which they have given currency. It would, however, be a misapplication and abuse of this rule to extend it to this case. The reason and policy of the rule is, to guard and protect *bona fide* holders of negotiable paper, which they have honestly received in the usual course of business. Here the party who asks the benefit of that rule is the very person who committed the fraud in the inception of the note, which is now relied on by the defendants to annul the contract. The nonsuit ought to be confirmed.

Judgment of nonsuit. (a)

(a) Vide *Mann v. Swann*, 14 Johns. Rep. 270. *Hubbly v. Brown*, 16 Johns. Rep. 70. *Powell v. Waters*, 17 Johns. Rep. 176.

*A. CHAMPLIN *against* T. C. BUTLER.ALBANY,
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ASSUMPSIT on a *quantum meruit*, for the wages of the plaintiff, as master of the ship *Lion*, on a voyage from *New-York* to *Canton* and back to *New-York*; and for the wages of his apprentice during the same voyage. The defendant pleaded *non assumpsit*, with notice of set-off. The cause was tried at the *New-York* sittings, in *April*, 1819, before Mr. Justice *Yates*.

The plaintiff produced a formal and absolute bill of sale of the ship from *Minturn & Champlin* to the defendant, for the consideration of 30,000 dollars, without date, but which was proved to have been executed about the 20th of *December*, 1815;—an affidavit made the 22d of *December*, 1815, by the defendant, before the deputy collector of the customs, by which he made oath that he was the true and only owner of the said ship;—the register of the ship of the same date, stating the defendant to be the sole owner;—the usual letter of instructions from the defendant, as owner, to the plaintiff as master, when about to sail on the voyage, dated *December* 20, 1815;—also, a letter dated *February* 24, 1817, from the defendant to the plaintiff, on the arrival of the ship off the port of *New-York*, on her return from *Canton*, directing in what manner he should report the ship and cargo in his manifest. The plaintiff also proved, that he had performed the voyage as master of the ship; that, previous to the voyage to *Canton*, she was owned by *Minturn & Champlin*, and had arrived from *Gottenburgh*, under the command of the plaintiff, who took charge as master for the voyage to *Canton* on the 23d of *November*, 1815; and on the 20th of *December*, 1815, signed the following contract: "I have this day agreed with *Minturn & Champlin* to take charge of *the ship *Lion*, as master, for one hundred dollars a month, and seven tons privilege."

The defendant offered to prove, by parol, that the bill of sale from *M. & C.* to him was intended merely as a mortgage. The evidence was objected to, but admitted by the judge, reserving the question for the court. The witness testified, that the bill of sale, though absolute in terms, was intended to be a security merely, by way of mortgage, to the defendant, for responsibilities he had entered into for *M. & C.* to a large amount, particularly as surety for them on bonds at the custom-house, and for advances made to *M. & C.* That *M. & C.* being in embarrassed circumstances, the ship was fitted out for the voyage, and the arrangement entered into with the defendant, in the expectation of relieving themselves from their difficulties; and, also, to prevent the ship and cargo from being attached by creditors in foreign ports; that the defendant had no interest in the ship or cargo, either as to profit or loss,

In an action by the master of a ship, for his wages, against the defendant, as owner, and who held an absolute bill of sale from *M.*, as well as a register of the ship, in his own name, the defendant may prove by parol that the bill of sale was given to him merely as collateral security, by way of mortgage.

A mortgagee of a ship, in possession, is liable to the master, for his wages, if the voyage be performed for the benefit of the mortgagee.

But where the master made a special agreement as to his wages, with *M.*, the real owner or mortgagor, and with full knowledge of a secret agreement between *M.* and the defendant, who

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had no interest in the voyage, but merely lent his name to cover the voyage, for the benefit of *M.*, and without receiving any freight or profit, the plaintiff was held bound by his special agreement, and could not waive it, and sue the defendant as owner.

Where there is an express contract for a stipulated amount and

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made of compensation for services, the party rendering the services cannot waive the contract, and resort to an action for a quantum meruit, on an implied assumption. (a)

(a) Vide *Florida v. Edwards*, 19 Johns. Rep. 305. *Jewell v. Schroepfer*, 4 Cowen's Rep. 564.

which might accrue on the voyage; and agreed with *M. & C.* that they should have the exclusive control of the ship for the voyage, and they put on board 110,000 dollars, to purchase a cargo, on their own account, which were shipped in the name of the defendant; that *M. & C.* wrote the letter of instructions to the plaintiff, which was signed by the defendant, who had policies of insurance effected on the ship and cargo, for whomsoever it might concern, and gave his notes for the premium. That the plaintiff, before he sailed, was fully informed of the arrangements between *M. & C.* and the defendant, for covering the vessel and cargo by the defendant's name; and that *M. & C.* owned the cargo, and had paid all the advances for the ship, and were to pay the seamen's wages; that when the ship sailed from *Sandy Hook*, on her voyage out, the plaintiff, as master, gave an order on *M. & C.* to pay the pilotage, which was accordingly paid by them. That, on the return of the ship to *New-York*, *M. & C.* paid off the crew, and requested the plaintiff to present his bill, which he accordingly gave to them, dated the 12th of *May*, 1817, making them debtors to him for the amount. That *M. & C.*, on the 13th of *May*, paid him 500 dollars, leaving a balance due to him of 957 *dollars and 37 cents, which remained unpaid. That *M. & C.*, in *October* following, were discharged under the insolvent act.

The defendant objected, that the plaintiff having shown a special agreement for wages, could not recover in this action, on the general count for a *quantum meruit*; but the judge reserved the question, and directed the jury to find a verdict for the whole sum, and they, accordingly, found a verdict for the plaintiff for 1,091 dollars and 94 cents, subject to the opinion of the court on the whole case, which either party was to be at liberty to turn into a bill of exceptions.

*Antho*n, for the plaintiff, contended, 1. That the evidence in the case fully proved, that the defendant was the owner of the ship; and that the register itself was conclusive as to that fact, in this case. (14 *East*, 230. 2 *Campb. N. P. Rep.* 170. 2 *Taunt. Rep.* 5. 14 *Johns. Rep.* 201. 15 *Johns. Rep.* 303.) The defendant cannot be permitted to contradict his own solemn act and oath. But it will be said that the bill of sale, though absolute on the face of it, was, in fact, a mortgage; but after the full evidence of absolute ownership, can the defendant prove, by parol, that the transfer was by way of a mortgage? As between the parties, they must be concluded by the written documents, and are not at liberty to gainsay the fact as to the defendant being the owner. (*Phillips's Evidence*, 423. 3 *Wils.* 275. 8 *Mass. Rep.* 517.) In the case of *Robinson & others v. McDonell*, (2 *Ald. & Barn. Rep.* 136.) which was perfectly analogous, it was held that, as between the parties, the absolute bill of sale was binding, and that the parol agreement could not be set up in contradiction to it. 2. But, ad 136

mitting the evidence, it shows, that the defendant was a mortgagee in possession, exercising every possible act of ownership in relation to the ship; and, as such mortgagee in possession, he is liable for the wages of the master and mariners.

3. The defendant took the ship subject to all existing encumbrances on her, and to all contracts made by the owners and master, previous to the transfer. (*Portland Bank v. Stubbs*, 6 Mass. Rep. 422.)

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D. B. Ogden, contra. If the plaintiff had sued *M. and C.*, he must have brought his action on the express agreement, *or. [* 172] have been nonsuited. He never could recover on the *quantum meruit*. Admitting that the defendant, afterwards, became the owner, may he not say to the plaintiff, "You must look to *M. & C.*, with whom you made your special contract?" Can the plaintiff, then, recover against the defendant on an implied *assumpsit*? The law will not imply a promise to pay, against the clear and manifest equity of the case. The plaintiff, before he entered into his engagement, as master, had full knowledge of the transaction between *M. & C.* and the defendant, and that the latter had no interest whatever in the vessel or voyage. It would, therefore, be unjust to permit him to recover against the defendant. After the voyage, the plaintiff made out his bill against *M. & C.*, and received a part from them; and did not call on the defendant, until he had parted with the property, and *M. & C.* had become insolvent.

It is true, that, as between the parties themselves, to a written instrument, parol evidence is not admissible to vary it; but this rule does not apply to third persons, where the object is to show the true nature of the transaction.

If the defendant was a mortgagee, he was the legal owner; and his oath, at the custom-house, was not inconsistent with the fact. Besides, the oath is merely that he, an *American* citizen, and not a subject of any foreign state, has the property in the ship; not but that some other *American* citizen may also have an interest.

T. A. Emmet, in reply, said, that as to the equity of the case, the defendant had the vessel as collateral security, and had been benefited by the services of the defendant as master. Suppose the plaintiff had been guilty of misconduct as master, so as to render himself liable to the owner, who would have had the right to maintain an action against him? The defendant. He ought, then, to compensate him for the services which he has faithfully performed. The privity of contract between the plaintiff and defendant, is sufficient in law to raise the implied *assumpsit*. The defendant having made oath that he was the owner, he ought to be held to all the consequences of ownership.

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*PLATT, J., delivered the opinion of the court. I see nothing to support the first objection, (as between these parties,) viz. that *parol* evidence should not be allowed, to prove that the bill of sale, absolute in terms, was, in fact, to operate as a mortgage merely. But whether the defendant be considered as an *absolute purchaser*, or as a *mortgagee in possession*, would, in my judgment, be immaterial, provided there was an actual contract of hiring between him and the plaintiff; and in either case, the relation of *owner* and *master* would exist, so as to support the claim of wages, if the voyage was performed for the use of the defendant.

What character the transaction might bear, as between the defendant and the creditors of *Minturn & Champlin*, whom it was intended to deceive, is not now a question. The *plaintiff* was privy to the whole arrangement. He lent himself, throughout, as a willing instrument to effectuate the secret agreement between *Minturn & Champlin* and the defendant. He was, in fact, a *party* to that agreement, and stipulated, in writing with *Minturn & Champlin*, for his reward, viz. 100 dollars per month, and seven tons privilege. That contract shows, that he undertook the voyage with a clear understanding, that he was to look to them for his wages. It is proved, also, by the *supercargo*, that the plaintiff used his privilege of seven tons, in conformity to that agreement. It seems to me, therefore, to be utterly inadmissible, that he should now, since the insolvency of his real employers, be permitted to turn round and say, "The defendant was ostensible owner, and, therefore, he must pay me wages, although it was known to me that he had no interest in the voyage, and it was expressly agreed, that I should look to *Minturn & Champlin* for my compensation."

The plaintiff is bound by his *express* contract, and cannot waive it by electing to sue the owner, when it appears, that he knew that *Minturn & Champlin* were the real shippers, and that the defendant merely lent his *ship*, and his *name*, to cover a voyage for their exclusive benefit, and without any claim for *freight* on his part.

On the merits, therefore, I think the plaintiff is not entitled to recover. But the objection to the form of action seems to me, also, to be well founded. Here being an express *contract for a stipulated *amount* and *mode* of compensation for the services rendered, viz. "100 dollars per month, and seven tons privilege," the defendant cannot waive it, and insist on a *quantum meruit*.

The defendant is, therefore, entitled to judgment.

Judgment for the defendant.

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EJECTMENT for a farm in *Rhinebeck*, in the county of *Dutchess*, tried before Mr. Justice Yates, at the *Dutchess* circuit, in *September*, 1816. A verdict was taken for the plaintiff, by consent, subject to the opinion of the court, on a case containing the following facts: The lessors proved their title, by a deed dated the 5th of *January*, 1790, from *Margaret Livingston*, widow of *Robert R. Livingston*, to *Gertrude*, the wife of the lessor, *Morgan Lewis*.

The defendant gave in evidence a lease dated *November* 21st, 1805, from the lessors of the plaintiff to *John G. Hester*, by which the lessors, in consideration of the rents and covenants thereafter mentioned, to be paid and kept, &c. on the part of the lessee, "demised, set, and to farm let unto the party of the second part, his heirs, executors, administrators and assigns, all that farm," &c. "To have and to hold the farm, &c. to the party of the second part, his heirs, executors, administrators and assigns, for ever, to the proper use, benefit and behoof of the party of the second part, his heirs, executors, administrators and assigns, during the time aforesaid, yielding and paying therefor, yearly, and every year, unto the parties of the first part, and the survivor of them, and the heirs and assigns of the said *Gertrude*, for and during the term hereby granted, the yearly rent of eighteen bushels of good merchantable winter wheat, on the *first day of *May*, yearl: ; and, also, yielding, rendering, and performing to the said *M. and G.*, or the survivor of them, &c., one day's work yearly, with a wagon, sled or plough, and an able man to drive, with horses or oxen, to perform, as in such case is reasonable; and that in such manner, and at such time and place yearly, within six miles of the demised premises, as the said *M. and G.*, &c. shall, from time to time, appoint and direct: *Provided always, and these presents are upon this condition*, that if the said yearly rent, &c. or the one day's work, &c. shall be behind and unpaid, or unperformed, in part, or in all, for the space of twenty days next after, &c. or if the party of the second part shall not observe, keep and perform the several articles, covenants and agreements particularly expressed on his part, to be observed, &c., that then these presents, and the estate hereby granted, &c. are to be void, determine and cease," &c., with a clause of re-entry, and of distress, &c. Then followed the covenants on the part of the lessee, viz.: "That in case the party of the second part, his heirs, executors, administrators and assigns, or any of them, shall, at any time hereafter, be minded, and desirous to dispose of the said farm, land and premises herein before demised, or any part thereof, with the appurtenances, that then the party aforesaid of the second part, his executors,

A covenant or condition, in a lease to a person, his heirs and assigns, for ever yielding and paying a certain yearly rent, &c., that in case the lessee, or his heirs, &c., should be minded to dispose of the premises, or any part thereof, he should give to the lessor, or his heirs, &c., the right of pre-emption, or refusal of buying, and would not sell without his leave first obtained under his hand and seal; and that on every such sale, with such license, should pay to the lessor the one tenth

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of the money for which the premises were sold; and that in case the lessee did not keep and perform all the conditions, &c., the lease and the estate demised should cease, and be void, is a lawful and valid condition; and there being a clause of re-entry for a breach of the covenants, the lessor may bring ejectment to recover possession of the premises, on the forfeiture.

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administrators or assigns, shall and will first offer and give the pre-emption, of buying and purchasing the same unto the said *M.* and *G.*, or the survivor of them, &c., and shall not, nor will sell the same, but first have leave, under the hand and seal of the said *M.* and *G.*, &c. And on every such sale, so with leave as aforesaid obtained, shall pay to the said *M. & G.*, &c. a tenth part of the money for which such premises are so sold or assigned," &c.

Hester, the lessee, by an endorsement on the back of the lease, dated the 1st of *September*, 1812, assigned the lease and premises to *David Wager*, without any license from the lessors, and without offering the pre-emption or refusal to them, or paying them the one tenth of the price of such assignment.

The defendant then produced receipts to *David Wager*, dated on the 22d of *January*, 1813, and of the 19th of *July*, 1814, in full for rent, signed by the reputed agents of the lessors.

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*The defendant offered to prove, that he had paid to *Alexander Thompson*, since deceased, and who was in the habit of receiving rents for the lessors, the one tenth part of the consideration money, for the assignment of the lease to *Wager*; but the judge overruled the evidence. The lessors proved, by the agent who gave the receipt in 1814, that he was induced to settle with *D. Wager* for the rent, from seeing his name in the rent book kept by the former agent of the lessors, but that he had never communicated the fact to the lessors, nor did he believe that they were acquainted with it; that the witness had never exhibited any account to the lessors, or made any settlement with them. It was proved that *Wager* had agreed to sell the premises to the defendant for 1150 dollars, part of which he had paid; and that the defendant entered into possession of the premises in pursuance of that agreement, though *Wager* retained the lease and assignment until the whole money was paid: and in 1816, the defendant carried the rent wheat to the mill of the lessors, with a view to be acknowledged tenant; but the miller refused to accept the wheat.

This cause was argued in *May* term, 1818, by *J. Emott* for the plaintiff, and by *Oakley* for the defendant; and again, in *January* term last, by *F. A. Livingston* and *M. Lewis* for the plaintiff, and *Oakley (A. G.)* for the defendant.

For the plaintiff, it was contended: 1. That the lease or instrument under which the defendant claimed title, did not convey an estate in fee simple, or the highest estate known in the law, transferring the whole interest of the grantor to the grantee, to be held in absolute demesne as of fee; but that it was rather a sort of base or qualified fee. That the parties intended to establish the relationship of landlord and tenant between them, by this indenture, was evident from the language of the instrument: The words are "demise, set, and to farm let," which always denote a tenancy, and not a fee simple absolute; the 140

grant is subjected to various reservations: a *rent charge*, or annual rent, with a power of distress; a *rent service*, or certain personal services to be performed by the grantee; a right of pre-emption on sale; a tenth of the purchase money on alienation; a prohibition *to aliene without license; and, lastly, an agreement between the parties that each and every of these reservations shall be a condition, on the failure of which a forfeiture shall accrue, and the grantor have a right of re-entry. Here, then, are all the requisites to create a tenancy; and if a tenancy, there must be, if not an *actual*, at least, a *potential* reversion in the grantor. The only ground for presuming that this lease created an estate in fee simple in the first grantee, must be the words of *inheritance* and *perpetuity* contained in it. Now, though these words are essential, in a common law assurance, to create an estate in fee simple, yet they do not necessarily, *ex vi termini*, vest such an interest; for they may be so qualified as to give the deed the effect of *letting to farm* only. There is no valid objection to this species of letting in fee; and that it has existed in England from the earliest times, there can be no doubt. (*Termes de Ley*, 384. *Co. Litt.* 143. *a.* 143. *b.* Note, 144. *a.*—*Doug.* 627. 2 *Co.* 54. *Cro. Eliz.* 505.) Indeed, Sir William Blackstone, (2 *Bl. Comm.* 43.) in treating of rents, observes, that “a *fee-farm rent*” “is only letting lands to farm in *fee simple*, instead of the usual method for life or years;” and he defines it to be “a rent charge issuing out of an estate in fee, of, at least, one fourth of the value of the lands, at the time of its reservation;” though, as *Hargrave* observes, the quantum of rent is not essential to create a fee-farm. But whether such estates exist in England or not, is perfectly immaterial, for it is sufficient for our purpose that they exist here, and have been recognized by various acts of the legislature. (1 *N. R. L.* 73. 1 *Rev. Stat.* 727. sess. 10. ch. 37. s. 2. 27 *Hen.* VIII. c. 10. 1 *N. R. L.* 438. sess. 36. ch. 63. s. 17. 32 *Hen.* VIII. ch. 37.) Leases or grants in fee, reserving rents, have been in use in *New-York*, since the first period of its history as an *English* colony. The act of the 9th of *April*, 1805, (23th sess. ch. 98.) is declaratory of the law of this state on the subject. It says, “Whereas it has been doubted, whether the provisions contained in the act, entitled, ‘an act to enable grantees of reversions to take advantage of the conditions to be performed by lessees,’ extend to any but assignees of reversions dependent on estates for life or years; and whereas leases or grants in fee, *reserving rents, have long since been in use in this state, and to remove all doubts respecting the true construction of the said act,” &c., it is enacted, “that all the provisions of the said act, and the remedies thereby given, shall be continued to extend as well to grants or leases in fees reserving rents,” &c. In *Doe v. Carter*, (8 *Term Rep.* 57. 60.) Lord *Kenyon* says, “*modus et conventio vincunt legem*; though that maxim is to be taken with some qualification. For a grantor,

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when he conveys an estate in fee cannot annex a condition to his grant not to aliene, nor when he conveys an estate tail, a condition not to bar the entail. Such restrictions are imposed to prevent perpetuities; but short of that restriction, both parties to a contract may model it in what manner they please." This general doctrine will apply to a lease of this kind, as well as to any other.

At common law, the tenant could make a feoffment of a part, or of the whole of his lands, to be held of himself, thereby creating a *mesnalty* between the *tenant paravail*, and the *chief lord*, to the injury of the latter. To remedy this mischief, it was declared by the *great charter* of *Hen. III.* ch. 32. that no freeman should thenceforth give or sell any more of his land, but so that of the *residue*, the lord of the fee might have the services due to him, and which belonged to the fee. And so the law continued until the 18th *Edw. I.*, when, wearied with the questions perpetually arising as to the competency of the lands reserved, to answer the services to the *chief lords*, the statute of *quia emptores* was passed, at *their* instance, and for *their* benefit, enacting, that "thenceforth it shall be lawful to every freeman to sell, at his own pleasure, his lands and tenements, or part of them, so that the feoffee shall hold the same lands or tenements of the *chief lord* of the same fee, by such service and customs as his feoffor held before." From the last clause of this act, *Littleton, Brooke, Coke, and others*, (*Co. Litt.* sec. 215, 216. 223. *a.* *Bro. Cond.* sec. 57.) have drawn the inference, that since the statute of *quia emptores*, a condition not to aliene in a conveyance in fee, is void; because the statute having transferred the tenure from the *mesne* to the *chief lord*, no possibility of reversion remains in the *mesne* lord, whereby, on a forfeiture, the estate may revert to him; *evidently referring to the feudal common law tenures, and not to such as might be created on stipulated services and renders. But these same writers, afterwards, admit that collateral and special conditions are valid; (*Co. Litt.* 223. *a.* *Bro. Cond.* 135.) and *Brooke* (*Cond.* 57.) (*a*) states a case, (13 *Hen. IV.*) in which a condition not to aliene in a conveyance in fee, was held good. And Lord *Coke*, pursuing the same principle, that the condition is void, for want of tenure between feoffor and feoffee, is obliged to admit, that to produce the effect, the

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(*a*) The case in *Brooke* was this: Note by *Yelverton*, "That if a man lease lands for a term of years, on condition that he shall not grant over his estate, this is good, by reason of a reversion remaining in the lessor. The contrary of a feoffment on such condition, or that the feoffee shall not commit waste, for no right or interest remains in the feoffor."

Fulthorp. A man gives in tail, on condition that the donee shall not aliene or discontinue; this is a good condition, which *Ascus* granted and agreed to; (33 lib. *Ass.* p. 11.) and contrary of a fee simple; yet it is said, that in 13 *Hen. IV.*, in *ejectione firmæ* had before *Paston*, the law is contrary, as appears.

Bro. 135. Condition that *J. N.*, who is enfeoffed in fee, shall not aliene to any one, is not valid; contrary, that he shall not aliene to *W. S.* But a gift in tail, upon condition that the tenant shall aliene to no one, is good, by reason of the reversion in the donor. Per *Fairfax and Hussey*.

feoffor must part with his *whole* interest, and must restrain the *whole* power of the feoffee. (*Co. Litt.* 223. a. b.) In the present case, there is a *tenure* created by express contract; there is, moreover, a *rent service* which always creates a *tenure*. (*Co. Litt.* 142. a. 143. a.) Besides, the rent is connected with *prædial* service, and the land is made liable for both rent and service, to a right of pre-emption, and to the payment of a tenth on alienation. Can it be said, then, that the grantor has parted with his whole interest, or that he has not retained enough to support the possibility, at least, of a reversion? Again; the statute being made for the benefit of the *chief lords*, might be waived by their consent; and the lease is evidence, in this case, of the consent of the parties interested to waive it, and to allow the restraint on alienation.

But the statute of *quia emptores* never was in force in this state. Its object was to support the *military tenures*, *by securing to the *chief lords* of fees, their *escheats*, *wardships*, *marriages*, &c.; and these were all abolished by the 12 Car. II. in 1660, reserving only the tenure of free and common socage, *frankalmoigne*, *copyholds*, and the *honorary services* of *grand serjeantry*. But, at that time, *New-York* was a *Dutch* colony, and did not become a *British* colony until the 30th of *August*, 1664, so that the statute could not apply here.

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[SPENCER, Ch. J. We never supposed, that the statute of *quia emptores* existed here; though it might, perhaps, be resorted to by way of analogy to our *act concerning tenures*, the language of which is taken from the *English* statutes.]

The *act concerning tenures*, appears to be without object, and without effect. The first clause seems to be an attempt to revive feudal tenures, while the next section re-enacts the statute of 12 Car. II. abolishing such tenures. Those statutes can have no effect here; there is nothing on which they can operate. Here are neither *lords* nor *knights*. Any other tenure but what is purely *allodial*, is repugnant to the spirit and principles of our free government. Indeed, the sixth section of the act declares, that tenures upon gifts, grants, and conveyances heretofore made, or hereafter to be made by any letters patent under the great seal of the state, shall be, and remain *allodial*, and not feudal; while lands held by grants from the crown, previous to the 4th of *July*, 1776, are declared to be held in *free and common socage*; and the act provides, that nothing in it shall be construed to take away or discharge any rents certain, or services incidental to tenure in common socage. Why this distinction was made, it is not easy to imagine, unless it was to give color of right to a demand of the *quit-rents*, reserved to the crown on grants made under its authority, though previously taken away by the constitution, (35th article,) from the 19th of *April*, 1775, with the other *prerogatives* of the crown.

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Fealty was not only an incident to, but inseparable from all *tenures*. (*Co. Litt.* 93. a.) It was due to the *king*, in his capacity as *lord paramount* of the soil; and is very distinct from that *allegiance* which is due to him as head of the government.

*Though *fincs* for *alienation* are abolished, yet there is nothing in the act against the *tenth*s, on sales by lessees. Fines for alienation were strictly feudal. The framers of the act supposed that the feudal tenures did exist here. A statute abolishing all right and claim of *purveyance* was passed; yet *purveyance*, which was a royal prerogative, could not exist here. (Sess. 10. ch. 2.) The whole language of the statute refers to feudal rights and estates, and it was intended to abolish all feudal services. But, admitting even the right of the state to the *quit-rents*, as a forfeited royalty, and furnishing the only remaining link in the chain of *feudal* connection between *lord* and *vassal*, it cannot affect lands on which no quit-rents have been reserved. These must be purely *allodial*, and free from all influence of the statute of *quia emptores*, or its offspring the *statute concerning tenures*, both deriving their common origin from the feudal system. But these acts never were intended to touch private contracts. Could not the parties, before the statute of *quia emptores* in *England*, have annexed such a condition as this to a grant in fee? It does not take away all power of alienation. If a feoffment in fee, be on condition that the feoffee shall not infeoff *J. S.*, or his heirs, &c., it is good. (*Co. Litt.* 223. a. 223. b.)

Here, then, is a lease, *letting to farm in fee simple*, to which a lawful condition is annexed, and there is nothing unreasonable in the condition. Here is a perpetual lease of a valuable farm in a well settled country, worth above two thousand dollars, at a rent of about 27 dollars a year. The lessor must have had in view some compensation beyond the mere rent, and it is only by a covenant of this kind, that a bad tenant can be kept out, who might, by his bad management, injure the farm so as to diminish the value of the one *tenth* of the sale.

For the defendant, it was argued that the covenants in this lease, so far as they were a restraint upon the power of alienation, were repugnant and void: Undeniably so, in the case of a grant in fee simple absolute. And that this is a lease in fee makes no difference. *Fines* for alienation are void; (*Shep. Touch.* ch. 6. 129. *Co. Litt.* s. 360. 223. a. 3 *Comyn Dig.* tit. *Condition*, D. 5. *Cruise Dig.* tit. *13. ch. 1. s. 21. 24. *Bac. Abr. Condition*, L.) and this without any distinction between leases, or absolute grants in fee. All conditions in restraint of alienation, though not void, are still to be construed with great strictness, and in favor of the lessee. (*Cruise Dig.* tit. 13. ch. 1. s. 35. s. 36. 460. 120. *Comyn's 3 Dig.* Cond. (D. 7.) *Shep. Touch.* ch. 6. 153.) These *tenth*s on sales are in their nature a fine on alienation, and come within

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the doctrine in regard to such fines. Though the fine may be reasonable in this case, yet the court will look at the principle and the consequences of such covenants. This is not a covenant that the grantee of the lessee shall pay a *tenth* of the purchase money to the lessor; but that the grantor, or lessee himself, shall pay it; and if he neglects to do so, his grant becomes void. Can a lessee or party, by his own act, or omission to perform a covenant by paying a *tenth* of the purchase money which he receives to his lessor, defeat the very estate conveyed by him, and for which he has received the full consideration? The covenant is absurd, as it operates to create a forfeiture of the lease and estate, after it has been aliened to another.

But the question is, What estate passed by this lease under the laws of this state? Was it an estate in fee simple or not? An estate in fee simple is where a person holds lands to him and his heirs for ever. (*Co. Litt.* 1. a.) It is true that the word *fee* is derived from the feudal law. But we must take the word as it is now universally understood. It is quite unnecessary to go back to the history of the feudal tenures. Here is a grant to a man and to his heirs and assigns for ever, without any reservation of any part of the interest, to create a reversion. There is a certain condition for which the statute meant to provide a remedy, and such estates in fee simple are recognized. Suppose there had been no statute giving a remedy by ejectment in case of non-payment of the rent, how could the lessor ever get possession of the land for the rent? The whole interest of the lessor is conveyed, and his only remedy for a breach of the condition is under the statute. According to our law and the principles and spirit of our government, this must be deemed a fee simple, or the highest estate in law. If the condition is performed, it remains to the grantee and his heirs and assigns *for ever. If, then, it is an estate in fee simple, the question recurs, whether, if the grantor impose a condition that the grantee shall not aliene without his consent, such condition is not repugnant and void. That it is so, will appear from the authorities which have been cited. (*Bac. Abr. tit. Grant*, (1.) 393.) Whether the statute of *quia emptores* (2 *Reeve's Hist. of Eng. Law*, 223. 2 *Inst.* 500) was ever a law of *New-York* or not, it is unnecessary to inquire. It is referred to merely in aid of the construction to be given to our act concerning tenures. A practical construction must be given to that act. It was intended to encourage alienation, and thereby promote agriculture, and to give to every man the complete ownership of land, unclogged with the feudal burdens, services and restraints. It must be supposed that the legislature had some object in view when they passed this act. If, by the principles of the common law, or by the existing laws of this state, all feudal services and clogs were abolished, what object could remain on which the act was to operate, but con-

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tracts and conditions in restraint of alienation? There are many covenants or conditions which the law will not support; every illegal condition, whether precedent or subsequent, annexed to an estate, is void. So a condition against the policy of the law and the principles of the government is void. (*Shep. Touch.* 132.) So a condition in restraint of marriage. (*4 Burr.* 2225.) So if lands are given in fee tail, on condition that the tenant shall not suffer a common recovery (*Shep. Touch.* 132.)

That this is a beneficial mode of conveying lands, may well be questioned; but it is unnecessary to discuss that point.

PLATT, J., delivered the opinion of the court. It was proved that *Hester*, the lessee, by an endorsement on the original lease, assigned the premises to one *David Wager*, on the 1st day of *September*, 1812, without license; and without offering pre-emption to the lessors; and without paying one tenth of the price of such assignment.

An attempt was made to prove, by the subsequent receipt of rents, that the forfeiture had been waived: but that ground *of defence failed; because there was no evidence that the lessors were then *consuant* of the assignment. We are, therefore, compelled to decide upon the validity and effect of the covenant before recited.

It is contended, on the part of the defendant, (who holds under *Wager*,) 1st. that this being a lease *in fee*, to *Hester* and his heirs and assigns, according to the principles of the common law, the covenant *not to assign*, &c. is a condition *repugnant to the grant, and, therefore, void*. 2dly. That the covenant is annulled, and the lessee had an *absolute and unqualified* right to assign, by virtue of the statute "concerning tenures," passed 20th of *February*, 1787; (1 vol *J. & V.* 67.) and which has twice since been incorporated among the revised statutes.

The first ground of objection is, in my judgment, without foundation; because, this is a "*fee simple conditional*" at the common law; or a fee simple subject to be defeated upon a "condition subsequent," by the failure or non-performance of which, an estate already vested may be defeated. (2 *Bl. Com.* 154. *Co. Litt.* 201.) If the condition had been *general and absolute*, "*not to aliene*," it would have been *necessarily repugnant*, and, therefore, *void*. But here, there is no such repugnance. It is a grant to the lessee and his heirs and assigns; but coupled with a condition, that if he is minded to sell, he shall first offer the premises to his landlord, or obtain his license to assign: and that upon any assignment made by the lessee, he shall pay one tenth of the price to his landlord; or that the estate shall be defeated. A condition upon a feoffment *in fee*, not to aliene, is void. (*Co. Lit.* 223. *a.* 10 *Co.* 38. *b.*) But the grantee may be restrained from assigning for

a particular time; or from alienating to a particular person. (2 Leon. 92. 3 Leon. 192. Co. Lit. 223. a. Bac. Ab. tit. Condition, L.) So a condition that the grant shall be void, if the grantee becomes bankrupt, is a good condition. (*Doe, ex dem. Mitchinson, v. Carter*, 8 Term Rep. 60—64.) A condition in a grant in fee simple that the deed should be void, in case the grantee assigned to a Mussulman or a pagan, or to a *blacksmith or a distiller, would be a good condition, and not repugnant to the grant.

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If the lessee in this case had, in good faith, offered the pre-emption to his landlord; and, upon a refusal to purchase by the landlord, the lessee had, *without license*, aliened to a stranger, on paying or tendering to the landlord one tenth of the price, it would present a different question from that now before us. There would be a strong ground to insist, that a condition *not to aliene*, and a condition *not to aliene without license of the grantor*, would be of the same legal import, and equally repugnant to a grant in fee simple.

The "act concerning tenures," (sec. 1.) declares, "that it shall for ever hereafter be lawful for every freeholder to give, sell, or aliene the lands or tenements whereof he or she is, or at any time hereafter shall be, seised in fee simple, or any part thereof, at his or her pleasure, so always, that the purchaser shall hold the lands or tenements so given, sold, or aliened, of the chief lord, if there be any, of the same fee, by the same services and customs by which the person or persons making such gift, sale, or alienation, before held the same," &c. In order to interpret this statute, it is necessary to examine the history of the law of tenures. According to the *feudal system*, which is the chief origia of *English* tenures, neither the tenant *in capite*, (who held immediately of the king,) nor the tenant *paravail*, (who held of the tenant *in capite*,) had originally a right to aliene or devise the *feud*, without consent of the immediate lord of whom he held. (2 Bl. Com. 57—72.) By *magna charta*, and the statute of *Westminster*, (or *quia emptores*, &c. 18th E. I. ch. 1.) tenants *paravail* were authorized to aliene their whole estate, to be holden of the same lord, as they themselves held it before. But the king's tenants *in capite* were not included in the general words of those statutes, and could not aliene without license; and, if they did presume to do so, it was originally a cause of forfeiture. And, afterwards, by the statute of *E. 1w.* III. ch. 12., that severity was mitigated, so that the tenant *in capite* might purchase a license for one-third of the yearly value of the land; and if he sold without license, he should pay a full year's value, as a *fine for alienation*. (2 Bl. Com. 72. 2 Inst. 66.) By the 12th Car. II. ch. *24. tenures by knight-service (or military feuds) were converted into *free and common socage*; that is, an uncertain service at the discretion of his lord, into a fixed and certain rent or service. (2 Bl. Com. 77. 79.) *Free and common*

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socage could not be of the king *immediately*, but of a mesne lord, and of the king as lord paramount. (*Ibid.* 86.) The statute of *Westminster*, 18 *Edu.* I. ch. 1. (or *quia emptores*, &c.) directs, "that upon all sales or feoffments of land, the feoffee shall hold the same, not of the immediate feoffor, but of the *chief lord* of the fee, of whom such feoffor himself held it." (*Ibid.* 91.) The object of which was to secure to the chief lord (who was tenant *in capite*) the benefits of escheats, wardship, and other incidents, which before fell into the hands of the *mesne* lords. By the statute of 12 *Car.* II. ch. 24. *fines for alienation* were abolished.

In the revised edition of the statutes of this state, (by *Jones and Varrick*,) in 1787, such parts of those old *English* statutes, as were deemed applicable to our polity, were collected and consolidated in our "act concerning tenures." The object of the statute now under consideration, was not to *alter* the law, but to *adopt*, in express terms, such of the *English* statutes relating to tenures, as were deemed to be in force here. It was at that era, when our legislature drew the line of discrimination, and either *re-enacted* or *repealed* all the *British* statutes that extended to the colony of *New-York*. The design and effect of the 1st section of the act, was to regulate "*subinfeudations*," so as to empower a feoffee or tenant *paravoli* to aliene, which, at common law, originally he could not do, without express license, although no prohibition or condition of that kind was expressed in the feoffment. But the legislature never intended to deprive the parties of the power, by mutual consent, of framing such conditions as were before lawful.

Before the statute of *quia emptores*, the tenant could not aliene without express license, or stipulation for that purpose. The object of that statute, and of the 1st section of our "act concerning tenures," was to reverse the old rule, so that the right of alienation was made incident to the grant, and followed of course, wherever a fee simple estate was granted, unless the parties qualify that right by an express *stipulation. And provided the condition be not unlawful, nor impossible, nor repugnant, the parties have a right to bargain as they please.

The conditions stipulated in this lease are, that the lessors should have a pre-emptive right, and that, on every sale, they should receive one tenth of the purchase money. These conditions were neither unlawful, impossible, nor repugnant; they formed an essential part of the consideration for the grant; and we may reasonably presume, that from a regard to these covenants, the stipulated rents are lower than would otherwise have been agreed on. Therefore, as the lessée failed to comply with those conditions, the estate derived under the lease has become void, and the plaintiff is entitled to judgment.

SPENCER, Ch. J., said, that although he concurred in the

result of the opinion delivered by Mr. Justice *Platt*, that the plaintiff was entitled to judgment, on the ground that the condition giving the lessor a right of pre-emption, is a lawful condition; and not having been complied with, a forfeiture had been incurred; yet, on the other parts of the case, it was not necessary, nor did he mean to express any opinion.

Judgment for the plaintiff.

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THE PEOPLE *against* ROBERT M. GOODWIN.

THE prisoner was indicted and tried at the Court of General Sessions of the Peace, held in and for the city and *county of *New-York*, in *March* last, for manslaughter, in killing *James Stoughton*, Esq., on the 8th of *January* last. The trial lasted five days. The jury having retired to consider of their verdict, at two o'clock in the morning of the fifth day, remained until six o'clock in the afternoon of the same day, (*Saturday*), when they came into court, and being asked as to their verdict, answered, by their foreman, that they found the prisoner *guilty*, but begged leave to recommend him to the mercy of the court. Before the verdict was recorded, the counsel prayed that the jury might be *polled*; and on being polled, accordingly, the *third* juror answered not guilty. The jury were then sent out to reconsider of their verdict. At half past 11, P. M., and within half an hour of the legal termination of the sessions, the court sent to know whether the jury were agreed, and being informed that they had not agreed, they were sent for and returned into court. On being asked by the presiding judge, whether they would be able to agree within half an hour, being the latest period to which the court could sit, according to law, the jurors answered that "there was not the least possibility of their agreeing;" and the jury were, thereupon, discharged by the court. The court below having refused to bail the prisoner, he was brought before the *chief justice*, on the 3d of *April* last, who, after hearing counsel, admitted him to bail.

The defendant, pursuant to his recognizance, appeared at the last *May* term.

Van Wyck, District Attorney, stated that the only question was, whether the prisoner was to be again put upon his trial on the indictment.

Hoffman, for the prisoner, then moved for his discharge, on the ground that, having been once tried, he could not legally be put on his trial a second time. There were cases of phys-

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felony, as well as of *misdemeanor*, if the jury, after deliberating so long on the prisoner's case, as to preclude a reasonable expectation that they will agree on a verdict, unless compelled to do so by famine or exhaustion, they may be discharged, and the prisoner be again tried by another jury.

As where, on an indictment for *manslaughter*, the jury, after a trial of five days, and after being kept together to consider of the verdict for *seventeen* hours, declared that there was no probability of their agreeing on a verdict, and it being within half an hour of the time when the court was bound by law to close its session, the jury were discharged, and the prisoner again tried at another court.

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Peace of the city and county of New-York, having, by statute, (2 N. R. L. 503. sess. 36. ch. 85. s. 9. 2 Rev. Stat. 216. § 26.) all the powers of a court of oyer and terminer and gaol delivery, and to try for all crimes, (cases affecting life only excepted,) and to determine and adjudge the same, it possesses also, as an incident of the power to try, the right of discharging the jury, under circumstances in which a court of oyer and terminer might do so. Whether, since the statute, it has also the power of granting a new trial on the merits, Querre.

Where a prisoner tried at the Court of Sessions, is brought before this court, on habeas corpus and certiorari, and a second trial is ordered, the trial may be before a court of oyer and terminer and gaol delivery, or at the next sittings in New-York or Alba-

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ny, under the act, 1 N. R. L. 335. sess. 36. ch. 66. s. 1. 5. 2 Rev. Statutes, 203*

† Post, 215.

ical necessity, he admitted, where sickness, insanity, or other cause, rendered it impossible to proceed in the ordinary course, where the jury had been discharged, and the prisoner again tried; but no instance could be found of a second trial in a case of this nature. In all the cases where *the jury has been discharged, it has been in favor of life, or liberty, for the benefit of the prisoner, and on his motion.†

In the case of the *People v. Denton*, (2 Johns. Cases, 275.) the court say, "The power of discharging a jury in cases of misdemeanors, as in civil cases, rests in sound discretion, and is to be exercised with great caution." In the case of the *People v. Olcott*, (2 Johns. Cases, 301,) Mr. Justice Kent, who delivered the opinion of the court, after noticing the learned argument of Sir Michael Foster, in the case of the *Kinlocks*, (Foster, 22—40.) gives instances in which the rule that the prisoner, where the jury are discharged, cannot be remanded for another trial, has been made to give way to necessity; but they are of the same character, or where the prisoner has either consented to their discharge, or it was for his benefit; as where he becomes sick or insane, or one of the jurors is taken sick, or goes off. He observes that most of the cases on this subject relate to trials for capital offences; but the case then before the court was that of a misdemeanor only, in which the power of the court was analogous to its power in civil cases. In the case of the *Kinlocks*, natives of Scotland, who were arraigned before the special commission for trying the rebels of 1745, after the jury were sworn, doubts were entertained whether the prisoners might not avail themselves of a clause in the act of union, entitling them, as they supposed, to a trial in Scotland, and whether they could have the benefit of such defence, under the plea of the general issue. And upon their own motion, a juror was withdrawn, in order to let them in to plead the act specially. Though this was upon their own application, and for their benefit, it became a serious question, whether the consent of the prisoner would avail the prosecutor, or prevent the application of the general rule. Nine out of the ten judges who delivered their opinions on the question, it is true, agreed that it was not a case in which the general rule was binding. The cases of the *King v. Stevenson*, and of the *King v. Salbert*, (2 Leach's Cases, 618. 706.) were cases of necessity, where a juror, during the trial, was taken suddenly ill, and the jury were discharged, and the prisoners tried by another jury. These *being cases of necessity, it is admitted that they form exceptions to the general rule.

If the power of granting a new trial in cases of felony where the prisoner has once been tried, does belong to any court, the exercise of it could not be safely entrusted to a court of sessions. In cases of misdemeanors, the party can have a *certiorari*; but in cases of felony, it rests in the discre-

tion of the judges to allow or refuse it. A court of sessions has no power to grant new trials.

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Again, the *fifth* article of the *amendments* to the constitution of the United States declares that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, &c.—*Nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;*"—the words "jeopardy of limb," must mean deprivation of liberty, for *dismemberment* could not have been contemplated, since such a punishment did not exist for ages before, at the common law, except the loss of a hand for striking in the king's courts. And the following clause, "nor be deprived of life, liberty, or property, without *due process* of law," shows that those words mean loss of liberty, as there was no process of law for depriving a person of a limb. So *Coke* (2 *Inst.* 42.) understands the words in the great charter of Hen. III. "*Qui inquisitionem petit de vita vel membris;*" as the writ *de odio et atia*, given to a man who was *imprisoned*, though for the most odious cause. This provision of the constitution of the United States could never have been intended to be restricted to the courts of the United States, but was meant for the protection of every citizen of the United States in all courts and places. The *sixth* amendment shows the same solicitude to secure the right of the citizen; and these articles, as the constitution itself, are to be regarded as the paramount law of the land. If putting a person on his *trial*, was not putting him in *jeopardy* of limb, or *imprisonment*, would not the language have been, that no man should be twice *tried* for the same offence? The obvious meaning is, that he shall not be exposed to the *danger* of repeated attacks and experiments on the part of the public prosecutor, under which the most innocent must, at last, *succumb. The word *jeopardy*, in its *legal*, as well as in its etymological or grammatical sense, means danger or hazard.

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Griffin and *Wells*, contra, admitted that it was a great and very important principle of the common law, that the accused could not be twice put in jeopardy for the same offence. But this principle is to have a reasonable application. It does not mean that the accused shall not be put a second time at the bar of the court. The true and just sense of the maxim is, that, having been once fully and fairly tried on the merits, and a verdict found in his favor, he shall not be tried again, but the verdict shall shield him from a second exposure to punishment. The argument on the other side, rests on the authority of *Lord Coke*; yet his doctrine, as has been shown by *Sir Michael Foster*, is not supported by the authorities which he cites; and it might be sufficient to refer to the case of the *Kinlocks*, (*Foster*, 23.) to establish the conclusion, that a jury may be discharged, with or without the consent of the prisoner

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in a criminal case of any description, and the prisoner be again tried. So that the rule is clearly not so unqualified and inflexible as has been supposed on the authority of my Lord *Coke*. But it is conceded by the counsel that these are exceptions to the rule, and that is enough for our argument. Sir *Michael Foster* very justly observes, "that all general rules touching the administration of justice, must be so understood as to be made consistent with the fundamental principles, of justice; and, consequently, all cases where a strict adherence to the rule would clash with those fundamental principles, are to be considered as so many exceptions to it." But these exceptions are cases of necessity; (4 *Bl. Com.* 360.) the object of the rule being to prevent juries from being discharged, from motives of vengeance, oppression, or caprice; or merely to give the public prosecutor chance to repair his own mistakes at his own convenience. Such instances of persecution or oppression may, in bad times, have stained the records of *English* jurisprudence; but they are no longer of any weight or authority. And the rule, with the exceptions for which we contend, is not only *the established law of *England*, but has been reviewed and adopted in our own courts. (*Keyl*, 25, 26. *Comb.* 401. *Elizabeth Meadow's case*, *Foster*, 76. *T. Raym.* 84. *People v. Denton*, *People v. Olcott*, 2 *Johns. Cases*, 275. 301. *People v. Barrett & Ward*, 1 *Johns. Rep.* 66. *People v. Casborus*, 13 *Johns. Rep.* 351. 2 *Hale P. C.* 295. 1 *Chitty C. L.* 634. *Rex v. Edwards*, 3 *Campb. N. P.* 207. *S. C.* 4 *Taunt. Rep.* 309. *United States v. Coolidge*, 2 *Gallis. Rep.* 364.) In *Rex v. Edwards*, the prisoner was indicted for maliciously shooting at *L. R.*, with intent to kill him. During the trial, one of the jurors was taken in a fit, and the jury were discharged, and a new jury sworn; and the prisoner was convicted. The counsel for the prisoner in that case contended that, after the evidence was gone through, the jury could not be discharged; and if, from any circumstance happening at the trial, it becomes impossible for the jury to find a verdict of guilty, it was a sort of *God send* for the prisoner: but eleven of the twelve judges before whom the question was argued, without hearing the other side, were unanimously of opinion that the conviction was right; that it had been decided in so many cases, that it was now settled law, and gave judgment against the prisoner. But it is said that it is only in cases of *misdemeanors*, not in cases of *felony*, that the party may be tried a second time. Why such a distinction, if the reason is, that it is necessary to the administration of justice? *Hale* (2 *Hale*, *P. C.* 295, 296.) makes no such distinction; and in the *Doctor and Student*, (*Dial.* 2. ch. 52.) it is laid down, that "the justices may set such order in the matter as shall seem to them, by their discretion, to stand with reason and conscience, by awarding a new inquest." In the case of *U. S. v. Coolidge*, Mr. Justice *Story* would not allow of any such

distinction. He said, that in *misdemeanors*, there was a larger discretion, and though, before the time of *Foster*, it was supposed, that in *capital* cases, the jury could not be discharged, yet it was now settled that the discretion exists in all cases; but is to be exercised only in very extraordinary and special circumstances. So in the *Commonwealth v. Bowden*, (9 *Mass. Rep.* 494.) the prisoner was indicted for highway robbery, and the jury, after being out a day and a night, said that *there was no probability that they could ever agree on a verdict, and were discharged without the prisoner's consent, and he was afterwards tried and convicted by another jury: the Supreme Court of *Massachusetts* unanimously decided that the conviction was good; observing that the ancient strictness of the law on this subject was much abated in *England*; and that it was inconsistent with the genius of our government to compel jurors to agree: And though the case of the *People v. Olcott* was that of a misdemeanor, yet the whole reasoning of Mr. Justice *Kent* is to the same effect, and shows that, had it been a case of *felony*, his opinion would have been the same. (2 *Day's Rep.* 504.) Nor is the argument drawn from the *Sessions of New-York*, being an *inferior court*, entitled to any weight. That court, by statute, (2 *N. R. L.* 503. 2 *Rev. Stat.* 216. § 26.) is invested with all the powers of a court of *oyer and terminer* and *gaol delivery*, excepting as to capital cases. Being, then, empowered to try such offences, that power must be according to the same rules which govern the highest court. It must act precisely as a *court of oyer and terminer* and *gaol delivery* would act, if the case was to be tried in those courts. The *Court of Sessions* in *New-York* is to be considered a court of *oyer and terminer*, for every purpose in execution of the powers thus given to it by statute. If a verdict of *acquittal* upon an indictment, materially defective, will not afford a good plea in bar to a second trial for the same offence, surely there is much less reason why the prisoner should be discharged under the circumstances of the present case.

As to the objection drawn from the *fifth* article of amendments to the constitution of the *United States*, it is wholly inapplicable to the state courts: it could not be intended thus to limit the state courts and state sovereignties. The amendment grew out of the natural jealousy existing in the states, of the powers of the general government; and were intended to provide for offences under the laws and constitution of the *United States*. It was for the purpose of abridging the powers of the *United States*, and to secure and uphold the jurisdiction and sovereignty of the individual states. And the legislature of this state might now pass a law, if it were *expedient, that parties should be tried on a second indictment, though the first may have been good. But admitting that the amendment was applicable to the state courts, the terms of it

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do not apply here, for the defendant, if sent to another jury, will not be put twice in *jeopardy*, nor *twice tried*; for there never has been a trial in which the merits of the case have been decided upon. If merely being put on trial, and the jury are discharged, because they cannot agree, is sufficient to prevent a second trial, what becomes of all the exceptions to the general rule which, it has been conceded, do exist? What, then, becomes of the doctrine derived from the amendment to the constitution of the *United States*, which contains no exceptions, nor any provisions for those casualties which necessarily create them?

T. A. Emmet, in reply, contended that a case like the present had never been decided in this court, nor in any of the higher courts of any of the *United States*, except one, (9 *Mass. Rep.* 494.) where it was decided erroneously, and without adverting to or understanding the provision of the constitution of the *United States*, on the subject. Lord Coke, (3 *Inst.* 110.) from the manner of his expression, evidently considered it to be a *fundamental rule* of the common law, when he says, "To speak it here, once for all, if any person be indicted of *treason*, or of *felony*, or *larceny*, and plead not guilty, and, thereupon, a jury is returned and sworn, their verdict must be heard, and they cannot be discharged, neither can the jurors in those cases give a *privy verdict*, but ought to give their verdict openly in court." In 1 *Inst.* 227. *b.* the words, though different, have the same meaning: "A jury," he observes, "sworn and charged in case of life or member, cannot be discharged by the court or any other, but they ought to give a verdict."—What Sir T. Raymond, (84.) says of *Ferrari's* case, shows that such was the opinion prevailing among the learned in the law. (*Hale's Summary*, P. C. 267.) The rule is also laid down by *Carthew*, (465.) and is adopted by *Hawk*, (P. C. B. 2. c. 47. s. 1.) and with a slight restriction, by *Blackstone*, (*Comm.* 354. 3 *Bac. Abr.* 768. *Juries*, G.) *Carthew* says that the rule was stated by *Holt*, Ch. J., in the case of the *King v. Perkins*, to have been so *decided by all the judges of *England*, upon debate before them. It is true, the judges and the counsel for the crown in *Kinlock's* case doubted, and asserted that "except the resolution reported by *Carthew*, there is not a single authority in the books, that a juror may not be withdrawn, or the jury discharged, even in capital cases, with the consent of all parties." Now we find, in the report of the case of the *King v. Perkins*, 1698, (*Rep. temp. Holt*, 403.) that it is there stated as having been so resolved by all the judges. *Carthew*, therefore, is not only supported by this authority, but also by a MS. note of the same resolution by Mr. Justice *Tracy*, referred to by Mr. *Jodrell*, the counsel for the prisoners in *Kinlock's* case. These three concurrent reports of that resolution are very feebly opposed by the MS.

report of the case of the *King v. Perkins*, by Chief Justice *Eyre*. The opinion expressed by *Kent*, J., in *Olcott's* case, is extra-judicial; but the judges in *Kinlock's* case did no more than to controvert the *absolute universality* of the rule laid down by Lord *Coke*, and to state exceptions; and none of the exceptions, whether right or wrong, bear any analogy to the present case. (Here the counsel examined the several cases. *Mansell's Case*, 1 *And.* 103, 104. *Roberts's Case*, *Kely.* 25, 26. *Whitbread's Case* and *Fenwick's Case*, 2 *St. Tr.* 827, 828. *King v. Jane D.* 1 *Vent.* 69. 2 *Hale H. P. C.* 295. *et vide Enlyn's Note.*)

Although there certainly has been a tendency, by the unceasing operation of exceptions, to undermine the general rule laid down by Lord *Coke*, yet the later *English* cases have not extended the exceptions beyond actual physical necessity. *Eiza Meadow's Case*, (*Foster*, 76.) *Rex v. Scalbert*, (2 *Leach*, 706.) and *Rex v. Edwards*, (3 *Camp. N. P.* 207. *S. C.* 4 *Taunt.* 309.) were all cases of extreme necessity. The cases in our own courts, as well the case of the *State v. Woodruff*, (2 *Day's Rep.* 504.) are those of *misdemeanors*, with which we have nothing to do in this cause. The case of the *People v. Casbous*, (13 *Johns. Rep.* 351.) it is true, was a case of *felony*, but it was decided on the same principle as the case of the *People v. Barrett & Ward*, (1 *Johns. Rep.* 66.) that, as the first indictment was bad, so that the judgment must have been arrested, the prisoner *was never put in jeopardy. In the court of *General Sessions* of the city of *New-York*, there have been, indeed, cases of *felony* where the jury has been discharged; and the case of *Huozhurst*, (2 *City-Hill Recorder*, 33. 1817.) indicted for *grand larceny*, where the trial ended at 2 o'clock, and the jury, not having agreed on a verdict, by 8 o'clock the same evening, were discharged, shows how far an inferior court, which cannot grant a new trial, will go in the exercise of this assumed discretionary power over juries. *United States v. Coolidge*, (2 *Gall.* 354.) was that of a misdemeanor; and though Mr. Justice *Story* held that the court had a discretion to discharge a jury, even in a capital case, he said it was to be exercised only in "very extraordinary and striking circumstances:" and he very properly, in that case, did not discharge the jury, but suspended the trial; and the indictment was afterwards quashed, on motion, as improperly found. The case of *Bowden*, (9 *Mass. Rep.* 494.) is, in truth, a case directly against the doctrine for which we contend; but it is the only one, and having been decided on the authority of modern *English* cases, without any reference to the provisions of the constitution of the *United States*, must be regarded as erroneous; for since the amendment to the constitution, no *American* court of justice is at liberty to adhere to *English* decisions on this subject, if they are found to be opposed to this provision of the constitution.

The fifth article of amendments to the constitution of the

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United States, has been misunderstood by the respectable judge (the mayor) who presided in the sessions, in *Hawxhurst's* case, and in the present case. He supposed, that the words "life and limb" related to the burning in the hand, a punishment which had been abolished. What, then, is the true meaning of the words "*in jeopardy of life or limb?*" In no state of the Union was there any punishment of limb applicable to a freeman, to guard against which, it could have been thought necessary to introduce that expression. We find the same expression in the *Bill of Rights* of this state, (1 N. R. L. 47. sess. 10. ch. 1.) which declares, that "no person shall be put out of his or *her franchise or freehold, or lose his or her life or limb, or goods or chattels, unless he or she shall be duly brought to answer, and be forejudged of the same, by due course of law." There never was, in this state, any law by which a person could be forejudged of loss of limb; yet this expression must have some meaning, or it would not have been used. It was copied into the bill of rights from an ancient *English* statute, and was, no doubt, introduced into the constitution of the *United States* from the same source. It should have, therefore, the same acceptation as in the original statute from which it was derived. It is one of the oldest expressions known in the law, derived from the ancient punishment of felonies, and has acquired a technical meaning, which has been preserved since the abolition of the punishment. It means treason, and every felony, whether clergyable or not, exceeding petty larceny, though the punishment of it should not affect life or limb. Before the *Norman* conquest, most, if not all, felonies, were punishable with death, redeemable, however, with the *wereg'd*. (1 *Hal. Hist. P. C.* 12. note.) In the time of *William I.*, and *William II.*, most felonies were punished by loss of limb; but in *Henry I.* 9. (A. D. 1103.) it was ordained by parliament, that the judgment for all manner of felonies should be, that the person attainted should be hanged by the neck, which continueth to this day. (3 *Inst.* 53.) From that time, though there was no punishment of loss of limb, yet the phrase continued to be used as expressing treason, or felony above the degree of petty larceny. *Hale* (*H. P. C.* 70. 73. ch. 65. s. 1.) says, "Generally, if an act of parliament be, that if a man commit such an act, he shall have judgment of life and member, this makes the offence felony, and this was ordinarily the clause used in ancient statutes, as *Westm.* 2. c. 34. 14 *Edw.* III. c. 10. 28 *Edw.* III. c. 3. 13 *Rich.* II. c. 3." Here the counsel went into a minute examination of these ancient statutes, most of which are referred to, and commented on by *Coke*, in his 3 *Inst.* (p. 90. 101.) He referred, also, to 2 *Inst.* 434. 1 *Inst.* 390. a. b. *Bro. Abr. Corone*, pl. 204. *Hob.* 293. *Hale's H. P. C.* 641. 1 *Hawk. P. C.* 305. B. 1. c. 40. s. 2. in further confirmation of his position, that where a statute *enacted a judgment of life or limb for any offence, it consti-

tuted such offence a *felony*, whether that word was used or not. The words, he said, also relate to *clergyable felonies*, (2 *Hale's P. C.* 330. 323. 325, 326. 373.) as well as those not clergyable, and had no reference to burning in the hand, used in clergyable offences, which was abolished in *Hen. VII. c. 13.* more than 200 years after the phrase had acquired a precise meaning in the law. Besides, burning in the hand was no part of the punishment, but merely to prevent the benefit of clergy a second time. (5 *Co.* 50. *a. b. Hob.* 294.) Nor does the phrase relate to cropping the ears or loss of hands. The loss of hands was a punishment for striking in a superior court of justice, which was never considered a *felony*, at least since the *Norman* conquest; and it being an aggravated contempt in the face of the court, it was punishable without the intervention of a jury. Besides, the punishments of cropping and loss of limbs, were enacted by comparatively modern statutes, as 5 and 6 *Edw. VI.* 33 *Hen. VIII.* and 8 *Eliz.* none of which were applicable to this country, and could never have been contemplated by the framers of the constitution. These words, then, convey a legal meaning, as definite as the word *felony* itself. And so Mr. Justice *Kent* understood them, in *Olcott's case*, when commenting on the rule laid down in *Co. Litt.* 227. *b.* in cases of life and member, "and so in all cases of felony."

Then, as to the meaning of the words, being "put in jeopardy;" they cannot mean the trying a person a second time, after one complete and effectual trial had been had; for it required no article of the constitution to prohibit that. This phrase, though well known in the language, and not of frequent use, and having no precise technical signification, yet is often found in our law books. (*Foster*, 37.) 'It signifies hazard, danger, peril. There may be cases in which the indictment is so radically bad, that no judgment could be rendered on it; or there may be some physical necessity or casualty intervening, that would render a conviction impossible; and in such cases, it might, perhaps, be said, that the prisoner had not been put in jeopardy. But the present case differs from every one that has been cited; and *it may be laid down as a general position, that where the judgment is good, and where the cause was committed to the jury, on evidence which would support a conviction, if they thought fit to convict, and where no necessity has occurred to prevent the delivery of the verdict, there is *jeopardy*. This article of the constitution has never been before distinctly brought into view, and it is directly applicable to the present case. Perhaps, those who suggested the amendment, foresaw the danger of a further extension of the exceptions to the general rule, and may have apprehended what *Kent, J.*, in *Olcott's case*, (1 *Johns. Cases*, 309.) has since expressed, and which may have been thought an alarming doctrine. "The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion

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of the court, to judge of that necessity, and to determine what combination of circumstances will create one." They may have intended to bring back the rule to its original simplicity and strictness; and leave it no longer to the discretion of judges to determine what combination of circumstances should create an exception. Our law, in this respect, is fixed on a firm and immovable basis, which cannot be shaken by any *English* authorities, prior or subsequent to the declaration of independence; and, hereafter, the only question on this subject will be, whether a person has been once put in jeopardy. It is unnecessary to consider any of the supposed cases of physical and inevitable necessity, in consequence of which, a trial could not proceed. Nor is it requisite to inquire whether this article has a binding force on the state courts. It creates no new rule. Its object is merely to settle the extent of, and to explain a rule admitted to be founded on the common law, but the limits of which had been disputed. It is a most authoritative interpretation of that rule. [The counsel here went into an examination of the origin and object of the amendment, and of the probable motives of the authors of it.] (1 *Laws of United States*, 72. new ed. by *Colvin*.)

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The counsel next discussed the question, whether, if the court should direct another trial, and did not think it consistent with the business of the term, to have the trial at bar, they might send it to be tried at the Court of *Oyer and Terminer and Gaol Delivery*, or before the judge who was to hold the next sittings in *New-York*. He observed that as the *Circuit Court and sittings*, and *courts of oyer and terminer and gaol delivery*, usually sat without any distinct commissions, the powers of the court to direct trials of this nature, must depend on the statutes by which they were regulated, (1 *N. R. L.* 335. sess. 36. ch. 66. s. 1. 5, 6. 15. 2 *Rev. Stat.* 203.) which he examined; and concluded, that the court had the power and election, either to try the cause at bar, or to send it to be tried at a *circuit or sittings*, or before a court of *oyer and terminer*. (a)

SPENCER, Ch. J., delivered the opinion of the court. A motion has been made to discharge the defendant, on the ground that it appears, by the return to the *certiorari*, that he has been once tried, and, therefore, cannot legally be tried again. He was indicted in the Sessions in *New-York* for manslaughter; the trial continued for five days, and the jury, after having received the charge of the court, retired to consider of their verdict; were kept together 17 hours, and, declaring there was no probability of their agreeing on their verdict, were discharged

(a) The above brief summary of the arguments of the counsel in this cause, which was most elaborately discussed, has been taken from the notes furnished to the reporter, by *William Sampson*, Esq., who has published a very full and accurate report of the trial, and of all the proceedings in this interesting case 158

after 11 o'clock at night, on the last day in which the court could sit. It appears that the jury had, in the mean time, between their receiving the charge of the court, and their discharge, come into court, and, on being asked if they had agreed on their verdict, answered, through their foreman, that they had agreed, and that they found the prisoner guilty, but recommended him to mercy; but, on being polled, the third juror called upon, declared his disagreement to the verdict. These are all the facts material to be noticed in considering the present motion.

The defendant's counsel rely, principally, on the 5th article of the amendments to the constitution of the *United States*, which contains this provision: "*Nor shall any person be subject for the same offence, to be twice put in jeopardy *of life or limb.*" It has been urged by the prisoner's counsel, that this constitutional provision operates upon state courts *proprio vigore*. This has been denied on the other side. I do not consider it material whether this provision be considered as extending to the state tribunals or not; the principle is a sound and fundamental one of the common law, that no man shall be twice put in jeopardy of life or limb for the same offence. I am, however, inclined to the opinion, that the article in question does extend to all judicial tribunals in the *United States*, whether constituted by the Congress of the *United States*, or the states individually. The provision is general in its nature, and unrestricted in its terms; and the sixth article of the constitution declares, that that constitution shall be the supreme law of the land; and the judges in every state shall be bound thereby, any thing in the constitution or laws of any state to the contrary notwithstanding. These general and comprehensive expressions extend the provisions of the constitution of the *United States* to every article which is not confined, by the subject matter, to the national government, and is equally applicable to the states. Be this as it may, the principle is undeniable, that no person can be twice put in jeopardy of life or limb, for the same offence.

The expression, *jeopardy of limb*, was used in reference to the nature of the offence, and not to designate the punishment for an offence; for no such punishment as loss of limb was inflicted by the laws of any of the states, at the adoption of the constitution. Punishment by deprivation of the limbs of the offender would be abhorrent to the feelings and opinions of the enlightened age in which the constitution was adopted, and it had grown into disuse in *England*, for a long period antecedently. We must understand the term, "*jeopardy of limb*," as referring to offences which, in former ages, were punishable by dismemberment, and as intending to comprise the crimes denominated in the law, felonies. The crime of manslaughter is, undoubtedly, a felony; and therefore, the prisoner is entitled to the protection afforded by the article of the con-

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stitution, whether we regard it as binding upon us by its own force, or as an acknowledged axiom of the common law.

- *The question then recurs, What is the meaning of the rule that no person shall be subject, for the same offence, to be twice put in jeopardy of life or limb? Upon the fullest consideration which I have been able to bestow on the subject, I am satisfied that it means no more than this: *that no man shall be twice tried for the same offence.* Should it be said, that we can scarcely conceive, that a maxim so universally acknowledged, and so interwoven with our institutions, should need an explicit and solemn recognition in the fundamental principles of the government of the *United States*, we have only to recur to the history of that period, and to some other of the amendments, in proof of the assertion, that there existed such a jealousy or extreme caution, on the part of the state governments, as to require an explicit avowal in that instrument, of some of the plainest and best established principles in relation to the rights of the citizens, and the rules of the common law. The first article of the amendments prohibits Congress from making any law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and petition government for a redress of grievances; the second secures the right of the people to bear arms; and, indeed, without going into them minutely, nearly all the amendments to that instrument indicate either great precaution in defining the powers of the national government, and the rights of the people and the states, or they evince a jealousy and apprehension that those fundamental rights might be impugned, so as to leave no doubt that, in the article under consideration, no new principle was intended to be introduced. The test by which to decide whether a person has been once tried, is perfectly familiar to every lawyer—it can only be by a plea of *autrefois acquit*, or a plea of *autrefois convict*. The plea of a former acquittal, Judge *Blackstone* says, (4 *Com.* '335.) is grounded on this universal maxim of the common law of *England*, that no man is to be brought into jeopardy of his life more than once for the same offence; and hence (he says) it is allowed as a consequence, that where a man is once fairly found not guilty upon an indictment, or other prosecution, before any court having competent jurisdiction *of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime. The plea of a former conviction depends on the same principle, that no man ought twice to be brought in danger for the same crime. To render the plea of a former acquittal, a bar, it must be a legal acquittal, by judgment, upon a trial for substantially the same offence, and the verdict of a petit jury. (1 *Chitty's Crim. Law*, 372.) In the present case, it is not pretended that the prisoner has been acquitted, unless the discharge of the jury, without having agreed upon their verdict,

and without the prisoner's consent, shall amount, in judgment of law, to an acquittal. This brings us to the question, whether the Court of Sessions could discharge the jury, under the circumstances of this case. If they could not, then I should be of the opinion, that, although there could be no technical plea of *autrefois acquit*, the same matter might be moved in arrest of judgment; and, if so, I can see no objection to the discussion of the question in its present shape, on a motion to discharge the prisoner.

In the case of the *People v. Olcott*, (2 Johns. Cases, 301.) all the authorities then extant upon the power of the court to discharge a jury in criminal cases, and the consequences of such discharge, were very ably and elaborately examined by Mr. Justice Kent; and it would be an unpardonable waste of time to enter upon a re-examination of them. In that case, the jury, after having remained out from 8 o'clock on *Saturday* evening, until near two o'clock the next day, and having, in the mean while, come into court two or three times for advice, declared there was no prospect of their agreeing in any verdict, and were discharged without the consent of the prisoner: One of the questions was, whether the discharge of the jury entitled the defendant to be discharged, or whether he could be re-tried. After examining and commenting on all the authorities, the position of the learned judge was this: "If the court are satisfied that the jury have made long and unavailing efforts to agree, that they are so far exhausted as to be incapable of further discussion and deliberation, this becomes a case of necessity, and requires an interference." He observed, "all the authorities admit that, when any juror becomes mentally disabled, by sickness or intoxication, it is proper to discharge the jury; and whether the mental inability be produced by sickness, fatigue or incurable prejudice, the application of the principle must be the same." Again, he observed, "every question of this kind must rest with the court, under all the particular or peculiar circumstances of the case. There is no alternative—either the court must determine when it is requisite to discharge, or the rule must be inflexible, that, after the jury are once sworn, no other jury can, in any court, be sworn and charged in the same cause. The moment cases of necessity are admitted to form exceptions, that moment a door is opened to the discretion of the court to judge of that necessity, and to determine what combination of circumstances will create one." The learned judge inveighs, with force and eloquence, against the monstrous doctrine of compelling a jury to unanimity, by the pains of hunger and fatigue, so that the verdict is not founded on temperate discussion, but on strength of body. Although the case of the *People v. Olcott* was a case of misdemeanor, the reasoning is, in my judgment, entirely applicable to cases of felony; and, although the opinion was confined to the case under consideration, a perusal of it will show that

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it embraces every possible case of a trial for crimes. The opinion was delivered in 1801, and since that time this question has come under consideration in several cases. In the case of the *King v. Edwards*, (4 *Taunt. Rep.* 309.) the indictment was for a felony; and while the prosecutor was giving his evidence, one of the jurors fell down in a fit, and he was pronounced by a physician, on oath, incapable of proceeding in his duty as a jurymen on that day; whereupon the jury was discharged, and a new jury sworn, and the defendant was convicted. The point whether the prisoner could be tried, after the discharge of the jury, without consent, was argued before all the judges in *England*, except *Mansfield*, Chief Justice, and *Lawrence*, Justice; all the cases were cited, and the judges, without hearing the counsel for the crown, said, that it had been decided in so many cases, it was now the settled law of the country, and gave judgment against the prisoner. The same course was adopted, upon nearly the *same state of facts, in *Ann Scalbert's* case; (*Leach's C. C.* 706.) and in the case of the *King v. Stevenson*, (*Leach's C. C.* 618.) the prisoner fell down in a fit during the trial, and the jury was discharged, and, upon his recovery, he was tried and convicted by another jury. In the case of the *United States v. Coolidge*, (2 *Gal. Rep.* 364.) a witness refusing to be sworn, the trial was suspended during the imprisonment of the witness for the contempt, and Mr. Justice *Story* held, that the discretion to discharge a jury existed in all cases; but that it was to be exercised only in very extraordinary and striking circumstances. In the case of the *Commonwealth v. Bowden*, (9 *Mass. Rep.* 494.) upon an indictment for highway robbery, the jury, after a full hearing of the cause, being confined together during part of a day, and a whole night, returned into court, and informed the judge that they had not agreed on a verdict, and it was not probable they ever could agree; whereupon, one of the jurors was withdrawn from the panel, without the defendant's consent, and the jury were discharged, and during the same term, another jury was impaneled for his trial, and he was found guilty. On a motion in arrest of judgment, the court refused the motion, saying that the ancient strictness of the law upon this subject had very much abated in the *English* courts; that it would neither be consistent with the genius of our government or laws, to use compulsory means to effect an agreement among jurors; that the practice of withdrawing a juror, where there existed no prospect of a verdict, had frequently been adopted in criminal trials in that court.

Upon full consideration, I am of opinion that, although the power of discharging a jury is a delicate and highly important trust, yet, that it does exist in cases of extreme and absolute necessity; and that it may be exercised without operating as an acquittal of the defendant; that it extends as well to 162

felonies as misdemeanors ; and that it exists, and may discreetly be exercised in cases where the jury, from the length of time they have been considering a cause, and their inability to agree, may be fairly presumed as never likely to agree, unless compelled so to do from the pressing calls of famine or bodily exhaustion. And, in the present *case, considering the great length of time the jury had been out, that the period for which the court could legally sit, was nearly terminated, and that it was morally certain the jury could not agree before the court must adjourn, I think the exercise of the power was discreet and legal. Much stress has been placed on the fact, that the defendant was in jeopardy during the time the jury were deliberating. It is true, that his situation was critical, and there was, as regards him, danger, that the jury might agree on a verdict of guilty ; but, in a legal sense, he was not in jeopardy, so that it would exonerate him from another trial. He has not been tried for the offence imputed to him ; to render the trial complete and perfect, there should have been a verdict, either for or against him. A literal observance of the constitutional provision would extend to and embrace those cases where, by the visitation of God, one of the jurors should either die, or become utterly unable to proceed in the trial. It would extend, also, to a case where the defendant himself should be seized with a fit, and become incapable of attending to his defence ; and it would extend to a case where the jury were necessarily discharged in consequence of the termination of the powers of the court. In a legal sense, therefore, a defendant is not once put in jeopardy, until the verdict of the jury is rendered for or against him ; and if for or against him, he can never be drawn in question again for the same offence. I entirely concur in reprobating the proceeding of withdrawing a juror, and attempting to subject a person to a second trial, because the public prosecutor was not prepared with his proofs. In the case of the *People v. Barrett & Ward*, (2 *Caines's Rep.* 304.) this court considered it equivalent to an acquittal.

The only remaining inquiry is, whether the power of discharging the jury in this case could be exercised by the Sessions.

The Court of General Sessions for the city of *New-York* is clothed with powers not entrusted to the general sessions of any other county. It has power to try for all crimes (cases affecting life only excepted) in as full and complete a manner as any court of oyer and terminer and gaol delivery, for the said city and county, and can hear, *determine, and adjudge the same. (2 *N. R. L.* 503. 2 *Rev. Stat.* 216. § 26.) It is not necessary now to decide whether the sessions in *New-York*, since the statute, can grant a new trial on the merits ; but having as full and perfect jurisdiction as the oyer and terminer and gaol delivery, excepting in cases of life, over all other cases, no doubt can be entertained that they possess all the

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incidents appertaining to the power of trying for these offences ; and the right to discharge the jury, under the facts and circumstances of this case, was an incident to the trial. Upon the whole, I am of opinion, that whenever, in cases of felony, a jury has deliberated so long upon a prisoner's case as to preclude all reasonable expectation that they will agree on a verdict, without being compelled to do so from famine or exhaustion, then it becomes a case of necessity, and they may be discharged, and the prisoner may be again tried. In the present case, we consider the discharge of the jury as a discreet exercise of the powers of that court, either on the ground that the jury had been kept together so long as to preclude all hope of their agreeing, unless compelled by famine or exhaustion, or on the ground that the powers of the court were to terminate within a few minutes, and that it was morally certain that the jury could not agree within that period, which produced an absolute necessity for discharging them.

In this opinion my brethren entirely concur, and the consequence is, that *Goodwin* must be tried at the next Sittings, and his recognizance, and that of his sureties, will be respited until the next *January* term.

Motion to discharge denied.

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Insurance on freight from Archangel, in Russia, to New-York. During the voyage the ship became so shattered and disabled by storms, that she was compelled to seek a port for safety, and put into the *Helder*, being a port of necessity ; where, on a survey, she was found to be so damaged, as to be unseaworthy and incapable of being repaired, unless at an expense much exceeding half her value : and though another vessel might

THIS was an action on a policy of insurance upon the freight of the ship *Samuel Whitney*, *W. E. Whitney*, master, on a voyage from *Archangel* to *New-York*, dated *November 22, 1815*. The policy was valued, and the sum insured was 8,000 dollars, at a premium of three and a half per cent. The cause was tried before Mr. Justice *Yates*, at the *New-York* Sittings in *April, 1819*.

The ship sailed on her voyage from *Archangel*, on the 21st of *August, 1815*, with a cargo consisting of hemp, linens, sail-cloth, glass-ware and iron. From the 13th of *September* to the 5th of *October, 1815*, the ship encountered a succession of sudden squalls, heavy gales, and violent storms, in which she was much shattered and damaged, and became leaky, so that it became necessary for the general safety to lighten the ship, and, after consultation with the officers and crew, 51 packages of linen, 83 packages of sail-cloth, and 16 boxes of glass, were thrown overboard ; and it was determined to seek some port. After experiencing violent head winds and incessant gales, until the 28th of *October*, they found themselves north of the *Texel*, which they entered on the 30th of *September*, and anchored

at the *Nieuwe Diepe*, about 18 Dutch miles from *Amsterdam*. At the request of the captain, who was also part owner, a survey was made of the ship at the *Helder*. The report of the survey was made about the 18th of *November*, and the cargo was unladen, and a second survey made about the 12th of *December*. The vessel was found to be a complete wreck, and so much damaged, as not to be worth repairing, and if all the money at which the damages were estimated, had been expended in repairs, it would not have rendered her seaworthy. The *whole cargo was wet and damaged; and part of the hemp rotten. The surveyors reported it to be in such a heated state as to be wholly unfit to be re-shipped; and, to prevent further loss, they recommended that both ship and cargo should be immediately sold at public auction, for the benefit of the concerned. The ship and cargo were, accordingly, sold at auction under the direction of the captain, who received the net proceeds at the *Helder*. It appeared that it was customary for ships to lie at the *Helder*, between which and *Amsterdam* there is a constant communication; and that the *Samuel Whitney*, or a ship of her size, could not have gone to *Amsterdam* before *March* or *April*, 1816.

It appeared that another ship might have been easily procured at *Amsterdam*, to carry an ordinary cargo from the *He'der* to *New-York*, at a low freight; but that no attempt was made to hire another vessel; and it was proved that the hemp was so thoroughly wet, that, at that season of the year, when there is almost continual rain and sleet, the hemp could not have been dried in the open air, so as to be in a proper condition for re-shipping. Several masters of vessels, who were examined as witnesses, agreed that no prudent man would consent to take a cargo of wet hemp on board of his ship, for such a voyage; that it was very liable to become heated and take fire; that the hemp was in a perishing state, and could not have been dried until the ensuing spring.

The ship and cargo were, also, insured by separate policies. The vessel and freight were abandoned, and a total loss was paid by the insurers on the vessel, after deducting the net proceeds, arising from her sale, received by the plaintiff: The cargo was not abandoned; but the loss was adjusted and paid, and the defendants, who were insurers of a part, settled with the plaintiff according to such adjustment.

A verdict was taken for the plaintiff, for 9,589 dollars and 77 cents, being the whole amount of the value insured, with interest, subject to the opinion of the court on a case containing the above facts, and which either party was to be at liberty to turn into a bill of exceptions, or a special verdict; and in case the court should be of opinion that the plaintiff was entitled to recover on the ground of a *pro rata* *freight, and any difficulty should arise as to the amount to be recovered, the

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easily have been procured at *Amsterdam*, at a moderate freight, to carry

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an ordinary cargo to *New-York*; yet the hemp being so much wet and damaged, as to render it wholly unfit, if not dangerous, to be reshipped in another vessel, even if any master would have been willing to carry a cargo in such state, the voyage was, therefore, broken up, and the vessel and cargo sold at the *Helder*, for the benefit of all concerned. The assured abandoned as for a total loss. *Iteld*, that the assured had a right to abandon, and to recover for a total loss, deducting freight, *pro rata itinaria* from *Archangel* to the *Helder*.

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same should be referred to Mr. *Johnson*, to ascertain and settle the amount.

Wells, for plaintiff.

S. Jones, jun., contra.

PLATT, J., delivered the opinion of the court. To sustain such an action on a policy for freight, the plaintiff must prove that the ship was disabled by the perils insured against; and that the cargo could not have been carried from the port of necessity to the port of destination, for one half the freight valued in the policy. The rule is now perfectly established, that a policy on freight does not insure the soundness of the goods, but merely their safe carriage to the port of destination. It is immaterial to the insurers whether the cargo arrive in good, or in bad condition, provided the goods specifically remain. If they perish from internal causes of decay, or are spoiled by reason of the perils of the sea, still, if they are carried to the port of destination, and are ready to be delivered there, or if the master is able, and offers to carry them, but the owner of the goods voluntarily elects to receive them at an intermediate place, the ship-owner is entitled to his full freight, although the goods are of no value to the shipper. (*Herbert v. Hallett*, 3 Johns. Cases, 93. *Griswold v. New-York Insurance Company*, 3 Johns. Rep. 321. *Saltus v. Ocean Insurance Company*, 14 Johns. Rep. 138.) If reasonably practicable, it was undoubtedly the duty of the master, as agent for the ship-owners, to have procured another vessel to carry the cargo from the *Helder* to *New-York*. He was bound to earn the whole freight, if he could; and in case of disaster, it was not an essential part of the contract of insurance on freight that the goods should be transported in that particular ship. (*Bradhurst v. Col. Ins. Co.* 9 Johns. Rep. 17.) Whether *Amsterdam* and the *Helder* are to be regarded as the same port, so as to oblige the master to resort to *Amsterdam* to find a vessel to complete the voyage, has been strenuously contested by the counsel. Considering the relative position of those two places, and their intimate commercial connexion, on the same arm of the sea, I incline to the opinion, that if the master was bound to seek another ship to continue the voyage, his duty required him to resort to *Amsterdam* for that purpose, if none could be procured at the *Helder*. In *Saltus v. Ocean Ins. Co.* (12 Johns. Rep. 107.) it was held, that the master, under like circumstances, was not bound to go from *Kinsale* to *Cork* (15 miles) to hire another vessel. Extreme cases often embarrass us, in the application of any rule; but, I think, a well-founded distinction exists between the two cases; because, between *Kinsale* and *Cork* there is *mare apertum*, and between the *Helder* and *Amsterdam*, it is *mare clausum*.

But in this case, I am of opinion, that it is proved, to a reasonable certainty, that the master could neither dry the hemp, nor re-ship it for *New-York*, on board another vessel, in the wet and perishing condition in which it was. *Brown and Tillinghast*, two masters, swear, that they would not have taken the wet hemp on board their vessels, and that there was probable danger of its setting fire to the ship; and, in their opinion, no prudent master of a vessel would take such a cargo on board. This opinion, of men so competent to judge, and according so perfectly with the common sense and obvious reason of the case, seems to me abundantly sufficient to establish the fact, that any attempt to charter a vessel to carry a cargo in such a state across the *Atlantic*, would have been unsuccessful. Suppose there was no ground to apprehend danger of ignition; what ship-owner, for treble freight, would expose his vessel, and every person having connexion with it, to the pestilential effluvia of a cargo of rotten hemp? If private interest were not sufficient to restrain men from making such a shipment, it ought to be punished as an offence against the public safety. I assume, then, that, without any fault or neglect of duty in the master, the ship was rendered unseaworthy by the perils of the sea; that she entered the *Helder* as a port of real necessity; that she could not be repaired for half her value; and that another vessel could not be procured to carry the cargo to the port of destination, for one half the freight as valued in the policy. The plaintiff had a right, *therefore, to break up the voyage, and to abandon the freight to the underwriters as for a total loss. But I think it equally clear, that the defendants are entitled to a deduction for freight *pro rata itineris*, upon the whole cargo (including the *Jettison*) from *Archangel* to the *Helder*. The owner of the cargo did not abandon to the underwriters, as he had a right to do, but chose to settle with them, on the principle of a *partial loss*. He, accordingly, by his supercargo, directed the sale at the port of necessity, and received the net proceeds *there*, as owner of the cargo. By such a course of conduct, the transaction is characterized as a *partial*, not a *technical total loss* of the cargo. And the shipper, having chosen to receive his goods, or the avails of them, in *Holland*, it presents a case in which the ship has earned *pro rata* freight. (*Williams v. Smith*, 2 *Caines's Rep.* 13. *Robinson v. Marine Ins. Co.* 2 *Johns. Rep.* 323. *Bradhurst v. Col. Ins. Co.* 9 *Johns. Rep.* 17. *Schiefflin v. N. Y. Ins. Co.* 9 *Johns. Rep.* 21.)

A reference must, therefore, be made to settle the amount of the recovery, pursuant to the stipulation in the case.

Judgment for the plaintiff accordingly. (a)

(a) Vide *Center v. The American Ins. Co. of New-York*, 7 *Cowen's Rep.* 564. *Dickey v. The New-York Insurance Co.* 4 *Cowen's Rep.* 222. *Peele et al. v. Merchant's Ins. Co.* 3 *Mason*, 27.

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A paper purporting to be a *venire*, but without the seal of the court, is a nullity.

Where a prisoner was tried at a court of oyer and terminer and goal

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delivery, for murder, and convicted, without a *venire* returned and filed, it was held to be error, and the judgment was arrested, and a new trial awarded.

A peremptory challenge made by the prisoner to the *polls*, is no waiver of his right to object to the want of a *venire*; for this is not a ground of challenge to the array.

Where a prisoner who has been found guilty, and judgment is arrested on his motion and in his favor, a new trial may be awarded.

THE prisoner was brought up from the county of *Alleghany* on a *habeas corpus*, and the indictment and proceedings against him in the Court of *Oyer and Terminer and Gaol Delivery*, in that county, were returned in obedience to a writ of *certiorari* directed for that purpose. It appeared that the prisoner was indicted for the murder of his wife, by administering to her *arsenic*, and he was tried and convicted in *June* last.

**Hudson*, for the prisoner, now moved an arrest of judgment, on the ground that no *venire* had been issued to the sheriff of the county of *A.* to summon the petit jury; it appearing, after the prisoner was convicted, that the supposed *venire* was not under the seal of the court, and that no official return was made by the sheriff to the *venire*, with the panel of jurors annexed to the writ.

In civil and criminal cases, a *venire* is indispensable, to authorize the summoning of a jury; and a writ without the seal of the court is no *venire*. (*Fitzhugh's Case*, *Cro. Jac.* 527. *Hawk P. C. B.* 2. ch. 41. s. 1. 2 *Inst.* 568. 2 *Hale*, *P. C.* 260, 261. *Cro. Car.* 448. 9 *Hen. V.* 2. 6 *Binney Rep.* 447. 1 *Chitty Cr. L.* 505. 508, 509. 412. *Bac. Abr. Juries* (B. 1.) The court might have awarded a panel of jurors *instantly*. (*People v. M'Lea*, 2 *Johns. Rep.* 381.) Nothing is to be taken by implication against the prisoner; he is not to be presumed to waive any of his rights. Though he appeared and challenged some of the jurors, he is not thereby precluded from objecting to the validity of the process and proceedings. It may be said, that under the 11th section of the act for regulating trials of issues, and for returning able and sufficient jurors, (1 *N. R. L.* 325. sess. 36. ch. 5. 2 *Rev. Stat.* 410.) the clerk might draw out the names of the jurors, without any *venire* previously issued, and deliver the panel of the names to the sheriff. But this section applies merely to the drawing the names, and not to the process or the summoning of the jury; (s. 9.) and the 16th section of the act concerning circuit courts and sittings, and the courts of oyer and terminer and gaol delivery, (1 *N. R. L.* 335. 36 sess. ch. 66. 2 *Rev. Stat.* 415.) requires the sheriff to summon the jurors.

Oakley, (*A. G.*) and *Collier*, contra, admitted that the *venire* in this case, being without a seal, was void; but they contended that, under the statutes which had been cited, no *venire* was necessary. Prior to the revision of the statutes, in 1801, the clerk of the court could not draw out the names of jurors, but the sheriff was directed to return the *venire*, with the panel containing the names of the jurors annexed to the writ. (1

Greenl. ed. Laws, 261. 264. sess. 9. ch. 41. 2 *Gr. ed. L.* 81, 82. sess. 11. ch. 39.) But in 1801, a change was made in the mode of obtaining jurors; and the *clerks were directed, on application of the sheriff, to draw the names of the jurors, and deliver the panel containing their names to him. (1 *K. & R. ed. Laws*, 378. sess. 24. ch. 98.) By the act passed March 16, 1803, (sess. 26. ch. 32. 3 *Webst. ed.* 252.) the names of the jurors for trial of issues in any court of record, were directed to be drawn, without any *venire* previously issued, or application from the sheriff, for that purpose, and the names of the jurors so drawn were to be returned by the sheriff to every *venire* returnable at such court. The act of the 25th of February, 1813, (1 *N. R. L.* 325. 328. s. 11. 2 *Rev. Stat.* 410.) dispenses with the necessity of issuing a *venire* in each cause; the clerk is to draw out the names of the whole number of jurors for each court, and to deliver the *panel* to the sheriff, who summons all of them, and that is the panel for the whole court; and is, afterwards, annexed by the clerk to any *venire* which may be returned. The whole authority of the sheriff is derived from the statute. He can summon only those jurors whose names are contained in the panel delivered to him by the clerk.

Again; the *oyer and terminer* may award a panel to be returned by the sheriff, without any writ or precept. (3 *Bac. Abr.* 728. tit. *Juries* (B.) *Foster, C. L.* 63. 2 *Hale P. C.* 261. s. 3. 1 *Chitty C. L.* 413. 506, 507.) The prisoner might have challenged the *array*; and that is the proper course, where the process is defective: (3 *Bac. Abr.* 731. *Juries* (B.) s. 3. 1 *Chitty C. L.* 538, 539.) and if a good cause of challenge to the *array*, it is waived by challenging to the *polls*. (1 *Chitty C. L.* 545. 2 *Hale P. C.* 273, 274. 2 *Hawk P. C.* 387. *Co. Litt.* 158. a. 3 *Bac. Abr.* 764. *Juries*, (B.) s. 11. *Hob.* 235. 12 *East*, 231. n.)

Talcot, in reply, said, that no issue of fact could be tried in any court, civil or criminal, without a process to summon a jury, and this process varies according to the court in which the trial is to be had. (1 *Chitty C. L.* 412. 506.) The prisoner was arraigned on the indictment before the court of oyer and terminer and gaol delivery. In *England*, no issue can be tried in either of those courts, without a precept to summon a jury. (1 *Chitty C. L.* 508, 509. *Peter *Crok's case*, 4 *State Trials*, per *Justice Treby*. *Hawk P. C.* b. 2. ch. 41. s. 1. 2 *Hale's P. C.* 260, 261.) The reason why the justices of gaol delivery may have a panel returned without a precept or writ, is, that before the court, they issue a general precept to the sheriff to bring before them a certain number of jurors, and out of this number supposed to be present in court, returned on the general precept, the court may award a panel to be returned, without any other precept. (3 *Bac. Abr.* tit.

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Juries, B. 1.) The act of 1801 never could have contemplated that there was to be no *venire*, or process to summon jurors. And all the provisions of the act of the 25th of February, 1813, (s. 9) and of the act of the 18th of April, 1818, relative to the qualifications of jurors in the counties of Niagara, Genesee, Alleghany, &c. (sess. 38. ch. 250. 3 *Webst. ed.* 258.) which require the qualifications of the jurors to be inserted in the *venire* or jury process, show, that such was the view of the legislature. The argument of the counsel for the people would go to establish the doctrine, that no *venire* was necessary in a civil cause; for the act is general as to all issues to be tried. In *Cooper v. Bissell*, (16 *Johns. Rep.* 146.) the court decided, that if a *venire* be executed by any other person than the sheriff, without a suggestion of special facts, or express award to the coroner or elizors, upon the record, it was error for which the judgment must be reversed. (1 *Chitty C. L.* 522.)

The return of the process by the sheriff is the only legal evidence of its having been served, and that a jury has been summoned. Here was no process, nor any return of the sheriff. A court cannot award a panel immediately, without some process awarded on the record, or demand of a jury. The demand on the record in this case, is of *freeholders*, and the act last cited directs, that the qualifications of jurors, in Alleghany, and the other counties there mentioned, shall be the possession of lands under contracts for the purchase of the same, and being worth 150 dollars, in personal property, or having made improvements on such lands to that amount, free of all encumbrances.

Then, can the court award a new trial in this case? This is not a case of necessity. It is not like *Goodwin's case*.† The irregularity has been owing to the default of the officer, whose *duty it was to see that a proper *venire* was made out and returned. There is a distinction between errors in process, and errors in the indictment. (9 *Hen. V. 2. case 7.*)

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SPENCER, Ch. J., delivered the opinion of the court. It has properly been conceded by the attorney general, that the paper purporting to be a *venire* is to be regarded as a nullity, it not having the seal of this court impressed upon it. The points which have been argued, and which the court is called upon to decide, are, 1. Whether the trial was regular without a *venire* returned and filed; 2. Whether the fact which appears on the return, that the prisoner peremptorily challenged several jurors, cured the defect of a *venire*.

It has not been controverted, and it certainly could not be, with effect, that at common law, a *venire* is essentially necessary to authorize the sheriff to summon a jury; and that an omission of that process would be a fatal defect. The trial of collateral issues, and a jury *de medietate linguæ*, form excep-
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tions to the general rule of the common law. It has, however, been urged, that the provisions of the statute for regulating trials of issues, and for returning able and sufficient jurors, (1 N. R. L. 323.) dispense with the necessity of a *venire*. The 11th section of the act authorizes the clerks of counties to draw the names of jurors for the trial of issues, without any *venire* previously issued, fourteen days previous to the holding of the courts, after giving ten days' notice; and after drawing the number required, and completing the panel, the clerk is to make out, and certify under his hand, a panel of the jurors so drawn, and deliver the same to the sheriff, "whose duty it shall be to summon the several persons whose names are contained in such panel, at least eight days previous to the sitting of such court, and to make return in what manner he has served such process."

The 16th section of the act concerning the circuit courts and sittings, and the courts of oyer and terminer and gaol delivery, (1 N. R. L. 339.) requires of the sheriffs of each of the counties, to cause to come before the courts of oyer and terminer and gaol delivery, to be held therein, twenty-four good and lawful men, as grand jurors, and likewise, so *many good and lawful men of the same city and counties respectively, duly qualified to serve as jurors therein, as the said courts of oyer and terminer and gaol delivery, or any justice thereof, shall, from time to time, direct; and it requires the district attorneys, as soon as conveniently may be, after every circuit court shall be appointed to be held, within their respective districts, and at least fifteen days before the time of holding the same, to issue precepts under the seal of the Supreme Court, directed to the respective sheriffs of the same cities and counties, for the purposes aforesaid, mentioning the day and place, when and where the said courts are to be held, and commanding the said sheriffs respectively to do what is required of them. These two statutes being *in pari materia*, must both be taken into consideration, in deciding whether the *venire* was intended to be dispensed with by the first statute. If these are construed together, it is manifest the legislature did not intend to supersede the use of a *venire*. It cannot be admitted, that in requiring the panel to be delivered to the sheriff, and in requiring the sheriff to make return in what manner he has served *such process*, the legislature could be guilty of the absurdity of considering the panel, containing only the names of the jurors, their places of abode and addition, as a process. The process referred to must be the *venire*, under the seal of the Supreme Court. The only necessity now remaining for the issuing and placing a *venire* in the hands of the sheriff, regards the return to be made upon it. The sheriff's return of the manner in which he has performed his duty, must be made on this process, that the court may be officially informed, that the sheriff has duly obeyed its mandate. Inas-

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much, then, as a *venire* was necessary at the common law, and as the statute yet requires it to be issued, the omission to issue it, we must consider an error apparent on the record; and in such a case, affecting life, we do not feel ourselves authorized to dispense with a process, required by the common law, and also by the statute, although we may not be able to perceive much use in continuing it.

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We are not of the opinion, that the prisoner's peremptory challenge of jurors was a waiver of his right to object *now to the want of a *venire*. It seems to be an admitted principle, that a challenge to the polls is a waiver of a challenge to the array; but the objection now taken, is not to the array; a challenge to the array is an exception to the panel in which the jury are arrayed and set in order by the sheriff in his return; and it may be made on account of partiality, or of some default in the sheriff who arrayed the panel. (3 Bl. Com. 359.) It is a humane principle, applicable to criminal cases, and especially when life is in question, to consider the prisoner as standing upon all his rights, and waiving nothing on the score of irregularity. We are, therefore, clearly of opinion, that the judgment must be arrested. His counsel has suggested a doubt, whether arresting the judgment does not entitle him to be discharged without being subjected to another trial. It will be observed, that the judgment is arrested on the motion of the prisoner. An act done at the request and for the benefit of a prisoner, we are clearly of opinion, cannot exonerate him from another trial. A case, analogous in principle, occurred in *Ontario* county, in 1814. A woman of color was indicted and tried for murder, and found guilty. The jury had separated, after agreeing on a verdict, and before they came into court; and on that ground a new trial was granted, and she was tried again. We know of no case which contains the doctrine, that where a new trial is awarded, at the prayer, and in favor of a person who has been found guilty, that he shall not be subject to another trial.

Let the prisoner be remanded to the gaol of the county of *Alleghany*, and let the proceedings be sent down by *procedendo*.

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Where a party to an agreement insists on the payment of stipulated damages, as a discharge, it must appear, that the damages stipulated

THIS was an action of covenant tried at the *Putnam* circuit, the 2d of *November*, 1819, before Mr. Justice *Yates*. The action was brought on an agreement between the parties, under their hands and seals, dated the 6th of *April*, 1818, reciting that the plaintiff gave to *William Watts* a bond and mortgage for 5,000 dollars, the payment of which was secured

by the land and premises in *Paterson* on which the plaintiff lived, and by land of the plaintiff in *Paulings*, called the *Burdock* place, and the land of the plaintiff in *Kent*, called the *Patty Wixon* place, which bond and mortgage had been duly assigned to the defendant: and that whereas the said land had been sold by virtue of the bond and mortgage, and divers suits and controversies had arisen between the parties, &c., the said parties, therefore, agreed that *J. C.*, *C. A.*, and *J. A.*, should, on or before the 20th of *April*, then instant, appraise the farm and premises on which the plaintiff lived in *Paterson* at its real value, without reference to the price it sold for, under the mortgage: and then the said appraisers were to ascertain what was due to the defendant on the bond and mortgage, with all the costs and charges, and strike a balance, and the balance, against whom it should be found, should be immediately paid by the party against whom it should be found; and in case the amount of the value of the appraisal was equal to, or exceeded the amount of the demands of the defendant, then the plaintiff was to have the *Patty Wixon* place, and the *Burdock* place; but in case the defendant's demands should exceed the amount of the appraisal, the plaintiff should have his option, to be determined immediately, whether he would pay the balance in money immediately, or have the appraisers *immediately appraise the *Patty Wixon* place and the amount be applied to the payment of the said balance; and if it exceeded the residue of the claims of the defendant, after applying the first appraisal, then the defendant was to pay the balance: but in case there should still be a balance in favor of the defendant, it shall then be optional with the plaintiff to pay the balance immediately in money, or have the said appraisers appraise the *Burdock* place, and its value applied to the payment of the defendant; and if the amount of the said appraisals shall exceed the amount of the defendant's claims, then he shall pay the balance; and in case the whole amount of the said appraisals shall not satisfy the defendant's claims, then the plaintiff should immediately pay the balance. And it was further agreed between the parties, that the appraisers should take into consideration the case of the *Burdock* and *Patty Wixon* farms, and the damage done to them, if any, by the defendant or his agents since the sale under the mortgage, and allow it to the plaintiff; and that the plaintiff shall give immediate possession from the date of the agreement, of the farm and premises on which he lived, to the defendant; and that the plaintiff should have the right to take off all his property from the same, and should not pay rent to the defendant, until the agreement was executed; and that if the plaintiff should take the *Burdock* place and *Wixon* place, or either of them, according to the agreement, then he was to have immediate possession of them, or either of them which he should so take: That if the agreement was not carried into effect, according to its true intent, it should

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are in lieu of a performance of the contract, the payment of which damages is an alternative for his election.

The defendant held a bond and mortgage executed by the plaintiff, and about which a controversy had arisen between them, and they entered into an agreement that three persons, named by them, should appraise the land and premises, and ascertain what was due on the

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bond and mortgage to the defendant, and strike the balance, and the party against whom the balance was found should immediately pay the same to the other party, &c.; and it was agreed, that if either party should refuse to fulfil the agreement, he should pay to the other 500 dollars. "which should be considered as liquidated damages." The appraisers accordingly appraised the value of the land, and ascertained the balance due to the defendant on the bond and mortgage, and found a balance of 310 dollars in favor of the plaintiff: Held, that the defend-

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ant could not,
on offering to
pay the 500 dol-
lars, liquidated
damages, con-
sider the agree-
ment as rescind-
ed, and set off
so much of the
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debt due to him
on the bond as
would satisfy
that amount,
and have the
balance certi-
fied in his fa-
vor; but that
the plaintiff was
entitled to re-
cover the 310
dollars, so found
by the apprais-
ers, but not the
sum agreed as
liquidated dam-
ages for not ful-
filling the agree-
ment. (a)

(a) Vide *Spencer v. Tilden*, 5 Cowen's Rep. 144, and note (b) to page 150. *Ibid.* Wood v. Edwards, 19 Johns. Rep. 308.

not affect, or in any manner interfere with the other business and proceedings of the parties; and that if either of the parties should refuse to fulfil the agreement, according to its true intent and meaning, the party so refusing should pay to the other party the sum of five hundred dollars, which shall be considered as liquidated damages." The plaintiff, after stating the agreement in his declaration, alleged, that the appraisers named, before the time limited, appraised the farm on which the plaintiff lived in P. at 5,000 dollars, and ascertained the amount due to the defendant on the bond and mortgage, and for charges, &c. to be 6,326 dollars and 91 cents, and struck a balance against the plaintiff of 1,326 dollars and 91 cents, and that the plaintiff immediately elected to have the *Wixon* place appraised, and the appraisers accordingly appraised the place and the damages thereon at 480 dollars; and that after deducting that sum, there still remained a balance due to the defendant of 846 dollars and 91 cents; and the plaintiff thereupon elected to have the *Burdock* place appraised, &c., and the appraisers thereupon appraised the same, and the use thereof and damages done thereon, at 1,157 dollars and 58 cents, and the amount of which appraisement exceeded the balance of the claims and demands of the defendant, as determined by the appraisers, 310 dollars and 67 cents, which the defendant had refused to pay, although requested, &c., nor had he paid the 500 dollars, liquidated damages, &c. The defendant cravedoyer of the agreement, and pleaded *non est factum*, with notice that he would give in evidence at the trial, that the plaintiff was, at the commencement of the suit, indebted to him in the amount of the bond above mentioned, that he would set off so much thereof as would be sufficient to satisfy and discharge the plaintiff's demand, and have the balance certified in his favor pursuant to the act.

After the plaintiff's witnesses were examined, the defendant admitted that the plaintiff was entitled, under the agreement, to the stipulated damages of 500 dollars, on the allowance of which he insisted that he had a right to consider the agreement as rescinded, and that the whole bond assigned to him by *Watts* remained in force against the plaintiff; and offered to prove that he had so elected and offered the plaintiff, before the suit was brought, and insisted on setting off a sufficiency of the amount of the bond to satisfy the said 500 dollars, and have the balance certified in his favor: but the judge decided that the set-off could not be allowed; that the bond was to be considered as canceled and paid, and that the defendant had no right to have the agreement rescinded, by paying the stipulated damages; and directed the jury to find for the plaintiff the sum of 310 dollars and 67 cents, being one of the sums demanded in the plaintiff's declaration, with liberty to the defendant to move to set aside the verdict on a case made; and the jury found a verdict for the plaintiff accord

ingly, subject to the opinion of the *court on the above case, which was submitted to the court without argument.

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WOODWORTH, J., delivered the opinion of the court. The principal question in this cause, arises on the construction of that part of the covenant declared on, which is contained in the following words: "It is further agreed, that if either of the parties to this agreement, shall refuse to fulfil this agreement, according to its true meaning and intent, the party refusing shall pay to the other party the sum of 500 dollars, which shall be considered *as liquidated damages*." On the part of the defendant, it is admitted, that he is liable to pay 500 dollars, and on the payment of that sum, it is contended, the parties are placed in the same situation they were before the covenant was made.

There is no doubt that if, upon a view of the whole instrument, it shall appear to have been the intent, that the damages stipulated should be received, in lieu of a performance of every thing covenanted to be done, and as an extinguishment of the appraisement itself, then the defence is well founded. In order to determine this point, a careful examination of the agreement becomes necessary. The intent collected from the whole instrument, must be carried into effect, although there may be a difficulty in reconciling all its parts. After an attentive examination, my judgment is convinced, that the construction contended for by the defendant was not contemplated by the parties, and ought not to be sanctioned.

It appears, that the plaintiff having mortgaged three farms to *William Watts*, for securing 5,000 dollars, and this mortgage having been assigned to the defendant, he had, by virtue thereof, sold the land mortgaged, and then had possession of two of the farms. Divers controversies and suits having arisen concerning the premises, the parties were mutually inclined to bring the controversy to a close, by a submission to three individuals. The basis of the submission was, that an appraisement of the land be made at its real value, and be applied to the payment of the debt due from the plaintiff, and of all legal claims and charges of the defendant against him, without reference to the price the land *sold for under the mortgage. The covenant, also, provides for the performance of certain things before the appraisement took place. At its date, *April 6th, 1818*, the plaintiff held the possession of one of the farms, and by that instrument bound himself to give immediate possession thereof from the date, reserving the right to take off all his property. The cause of inserting this clause may have been, that the farm on which the plaintiff lived, was, in the first instance, to be appraised, and, in any event, to be applied toward the discharge of the defendant's debt. Both parties expecting an appraisement would be made in a few days thereafter, it may not have been deemed necessary to defer the

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delivery of possession. The object and design of these parties appear to have been, that the decision of the appraisers should be conclusive on the matters submitted to them, and put an end to the controversy. This must be carried into effect, unless the clause respecting *liquidated damages* is in language so plain and explicit as to require a different construction. The question submitted was of considerable magnitude; the terms of submission were settled on principles of justice and liberality; the plaintiff was to perform acts immediately, altogether inconsistent with the idea that the covenant could be rescinded after the appraisement, by either party, on paying a sum in damages, thereby converting it into a conditional arrangement, by which the parties were left to speculate as to the appraisement, and if not approved, then to proceed in their suits at law. I think the parties contemplated otherwise, and that the clause relied on may be explained and applied in such manner as to leave the appraisement in full force, and allow the plaintiff the benefit of it. This is a case of submission to arbitrators. From the nature of the case, either party might revoke it; and if the authority had been revoked before the making the award, the arbitrators could not proceed. This right is incident to every case of submission, whether it be by bond, covenant, or by parol. The consequence of revocation would be, that where there is a penalty, it is forfeited, and the plaintiff would recover such damages, under the breaches assigned, as he may have sustained. (*Allen v. Watson*, 16 *Johns. Rep.* 205.) If, instead *of a penalty, *eo nomine*, the parties agree on a sum as liquidated damages, and one party revokes the authority, in such case, I apprehend the plaintiff would recover the specific sum agreed on. I consider the exercise of the power of revocation as one of the acts to which the damages apply. But they do not apply to the sum of 310 dollars and 67 cents, which appears to be the surplus of the appraisement, after paying the defendant his whole demand. The damages were intended to embrace two objects: to remunerate one party, if the other defeated the award by revoking the submission, and to compensate for the non-performance of those acts which the parties bound themselves to perform, previous to the award, and such as the defendant is bound to perform, if he retains the *Burdock* and *Wixon* farms. For aught that appears, every thing stipulated has been performed, excepting the matters which are the subject of this suit. That the stipulated damages do not apply as a substitute for the award itself, and thereby become the means of defeating it, I think very plain, upon this consideration, that the damages are given, “on a refusal to perform the agreement.” The moment the award or appraisement was made, the most important part of the controversy was settled and concluded, without requiring any further act to be done. Before the award, a large sum was due to the defendant on the bond and mortgage; after the appraise-

ment was made, and it appearing that the value of the land appraised exceeded the amount of all the defendant's claims, the demand of the defendant was satisfied, because no further act was required to be done by either party to give the award effect thus far. By the terms of the submission and the appraisement under it, the defendant's demands were extinguished, if the lands were appraised at more than their amount. They were appraised at a greater sum, and that excess is claimed in this suit. It is perfectly clear to my mind, that the *liquidated damages* have no application to this part of the subject; there is nothing here to *refuse or perform*, and without something which could be the subject of refusal, the clause has no effect. If, then, so great a portion of the controversy is extinguished by the mere force of the appraisement, and without any further act of the parties, can *there be any ground for saying, that the stipulated damages were intended as a substitute. If this point be conceded, and I do not see how it can be questioned, it would be absurd to allow, that as to the excess of the appraisement, whatever that might be, the parties intended, that instead of paying such excess, the party liable to the payment might elect to pay the liquidated damages in lieu thereof: And yet, if the defence is well founded, this is the necessary consequence. In all the cases where a party relies on the payment of liquidated damages as a discharge, it must clearly appear from the contract, that they were to be paid and received *absolutely in lieu of performance*. (4 *Dallas Rep.* 150. *Graham v. Bickham*.) In the case of *Slosson v. Beadle*, (7 *Johns. Rep.* 72.) and *Hasbrouck v. Tappen*, (15 *Johns. Rep.* 200.) it expressly appeared, that the damages were *in lieu of performance*, and payment thereof was an alternative reserved for the party's election. The present case is not equally explicit; but granting that no objection arises on this ground, still it must be limited to such things as were to be performed *by the parties*, and cannot extend to so much as the award, *per se*, settled and concluded; nor can they be substituted for the payment of the surplus, the right to which depends on the conclusiveness of the appraisement. In this view of the subject, the plaintiff cannot claim the stipulated damages, nor can the defendant elect, that on the payment thereof, his bond and mortgage may stand revived, and be set off against the plaintiff's demand. If it were necessary in this case, resort might be had, in furtherance of the intent, to a strict construction of the words "*shall refuse to fulfil*;" for it must be admitted, that a mere refusal is very distinct from a stipulation to receive a certain sum, instead of performance. A party may refuse, still he is bound to perform his contract, and I cannot perceive how his refusal is to be adjudged a waiver of performance, unless it is so expressed. There is another point of view in which this question may be placed. The plaintiff alleges, that the defendant has not paid the 310 dollars and 67 cents, the

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surplus remaining after satisfying the defendant's demand. The defendant covenanted that, if the amount of the appraisement exceeded *his claims, he would pay the balance. If the defence can be supported, it must be solely on the ground of the defendant's refusing to pay *this sum*; and it would then present a case, where one party covenants, on a certain contingency, to pay to another, a sum of money, with proviso, that if he refuses, then to pay a larger sum as liquidated damages. Such facts constitute no right to recover beyond the money actually due. Liquidated damages are not applicable to such case. If they were, they might afford a secure protection for usury, and countenance oppression under the forms of law.

My opinion, then, is that the set-off was properly excluded, that the plaintiff is not entitled to recover any thing for liquidated damages, and that the verdict was correctly taken for the 310 dollars and 67 cents. There is a further objection to the set-off relied on at the trial; the defendant had sold three farms under the mortgage, but it is no where stated for what sum they were sold. The defendant's claim, including the bond and mortgage, was 6,326 dollars and 91 cents. At the trial, the defendant contended, that "*the whole bond assigned to him by Watts, stood in force,*" and offered to set off 500 dollars, to pay the stipulated damages, and claimed to have the residue certified in his favor. If the defendant had been entitled to a set-off, it could only be for the amount remaining due, after crediting the money for which the land sold; yet, without offering any proof as to that point, the defendant claims the whole of the original debt without deduction. This was altogether inadmissible. The jury could not determine, from this statement, how much was allowable; or whether, after crediting the amount of sales, enough remained to satisfy the 500 dollars; and if there was more, how could they determine on the balance to be certified? On this ground, also, the defence was correctly excluded. The plaintiff is entitled to judgment.

Judgment for the plaintiff.

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*THE PEOPLE *against* GILBERT.

The People, not being named in the 5th section of the act for the limitation of criminal prosecutions, and of actions at law, (1 N. R. l. 181. sess. 24. ch. 183. 2 Rev. Statutes, 297. § 23.) are

THIS was an action on the case, brought in *May*, 1819, against the defendant, as one of the managers of the *Union College Lottery*, for selling, in 1816, tickets in the lottery, contrary to the provisions of the act for that purpose, and contrary to his duty as such manager, by reason whereof the amount of the tickets so sold by him had been wholly lost, &c.

The defendant pleaded, 1. Not guilty; 2. Not guilty at any

time within *six years* next before the filing of the bill of the plaintiffs against the defendant. There was a demurrer to the second plea and joinder.

Oakley, (Attorney General,) in support of the demurrer. The people are not bound by a statute, unless they are specially named. The rule in *England* is, that the king is not bound by any statute, which affects any right, title or interest belonging to the crown, unless it is made to extend to him by express words. He is not bound by the statute of limitations, for no *laches* can be imputed to him. The maxim is *nullum tempus occurrit regi*. This rule is not founded on royal prerogative, but on principles of public policy, that the state should not suffer from the negligence of its officers and servants. On the same principle, the king cannot be nonsuited; nor is he liable to pay costs. (4 *Bac. Abr. Limitation of Actions* (B.) 5 *Bac. Abr. tit. Prerogative*, E. 5. E. 6. E. 7. 5 *Cromyn Dig. Parliament*, (R. 8.) *C. Litt.* 119. a. *Plowd.* 143. *Hob.* 152. 154. 347. *Co. Litt.* 90 b. 139 b.) These are privileges attached to the sovereign. The people cannot attend to their rights, except through their officers. They ought not, therefore, to suffer by the lapse of time, or the negligence of those officers. All the reasons in support of this rule, in the case of a king, apply with greater force here, where the people are the sovereign.

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not bound by it,
and may bring
a personal action
at any
time.

T. A. Emmet, contra. *Nullum tempus occurrit regi*, is the maxim of prerogative. The constitution of this state, (*Art. *xxxv.*) has abrogated all the prerogatives claimed by the king of *England*. The legislature have enacted limitations as to every form of action, and to divest the people of every thing which resembled royal prerogative. The people can bring no action but what is given to them by the act. The sovereign, as such, can bring no action but what is specially authorized by law. Then, when the law gives an action to the people, it must be subject to the previous limitation annexed to such form of action. The king of *England* is bound by all statutes for the public good, and to prevent injury or wrong, though not named. (11 *C.* 74, 75.)

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Oakley, in reply, said, that the constitution abrogated only those parts of the prerogative which were exercised over this state as a colony. The statute does not give this action. The maxim, that *nullum tempus occurrit regi*, is not founded on the principle of its being a personal attribute of the sovereign; but of its being a political prerogative, for the security and benefit of the people.

WOODWORTH J., delivered the opinion of the court. By the common law, there was no stated or fixed time, as to the bringing of actions. Limitations are created by, and derive

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their authority from statute. (4 *Bac. Abr.* 461.) In *England*, it is held, that the king is not bound by the statutes of limitation; that no laches can be imputed to him, and whenever it occurs, he may rely upon his privilege, "*quod nullum tempus occurrit regi.*" (5 *Bac. Abr.* 561, 562. tit. *Prerog.* 3 *Inst.* 198.) The reason of the rule is founded on the presumption, that the king is employed in the affairs of government, and ought not to suffer by the negligence of his officers. In a representative government, where the people do not, and cannot legally act in a body, where their power is delegated to others, and of necessity must be exercised by them, if exercised at all, the reason for applying the maxim is equally cogent. When the people of this state succeeded to the rights of the king of *G. B.* and became an independent government, was not this principle of the common law incorporated into the system of our jurisprudence? By the 35th article of the state constitution, we adopted *the common law of *England*, so far as it formed the law of the colony of *New-York*, on the 19th day of *April*, 1775. After this recognition, the people of this state, as the supreme power, were entitled to claim the benefit of it in the same manner, and to the same extent, that it had been applied in *England*. On the ground of expediency and public convenience, this was necessary; as an attribute of sovereignty, it was equally important to be preserved. By the adoption of the common law of *England* in this state, the people acquired the right and privilege now contended for by the counsel for the plaintiffs. That such has been the construction by the legislature of this state, cannot well be questioned: By the "*act for the limitation of criminal prosecutions, and of actions at law,*" (1 *N. R. L.* 184. 2 *Rev. Stat.* 297. § 28.) the people limit their right to sue for lands, tenements and hereditaments to forty years; but in respect to personal actions they are silent, unless the 5th section, which relates to personal actions, should be construed so as to include the people when they prosecute. The people are not named in the latter section, and when not named, are not bound by an act of limitation any more than the king of *England* would be. The act shows that this must have been the intent of the legislature. Why should they specify the limitation in the case of real property, and prescribe none in personal actions? It is evident that they acted under a conviction, that the rights of the people could not be barred, unless by statute, nor even then, unless they were particularly named. The omission, then, to limit personal actions, leaves them to the operation of the common law. It is further evident from the statute concerning costs, that the same rule of construction applies. The people are not liable to pay costs when they fail, but they recover costs when they succeed: Why is this? The act concerning costs, (1 *N. R. L.* 343.) allows costs to the defendant, with a single exception, in cases where the plaintiff might have costs, had he succeeded; but it

has never been contended, that a defendant could recover costs against the people. The reason is the same as in the case before us; they are not included in the general expressions, nor was it intended they should be. Until the legislature have limited the period within which the *people may bring suits, the time is indefinite. That they have not made any statutory provision, except in the case stated, and that the people are not included under the act limiting the time for bringing personal actions, has, I think, been satisfactorily shown. In the case of *Stoughton et al. v. Baker & Vose*, (4 *Mass. Rep.* 522.) Chief Justice *Parsons* adopts the principle contended for by the plaintiff's counsel. One of the questions in that case arose on an ancient grant, which was under implied limitation. The grant was made in 1634. It was contended, that the defendant having been so long possessed of the estate, the state had no right to interfere, and could not now secure the benefit of the limitation by any legal remedy. The chief justice observes, "The limitation is not extinguished by any inattention or neglect in compelling the owner to comply with it, for no *laches* can be imputed to the government, and against it no time runs so as to bar rights." The result of my opinion is, that the demurrer is well taken, and that the plaintiffs are entitled to judgment.

Judgment for the plaintiffs.

BANK OF UTICA against P. SMITH.

THIS was an action of *assumpsit* brought against the defendant as endorser of a promissory note, dated *Utica, July *20, 1818*, made by *Soulden & Smith* and *A. Van Santvoord & Co.*, by which they promised, six months after date, to pay to the order of *Peter Smith*, 10,000 dollars, at the *Mechanics' Bank*, in the city of *New-York*, for value received.

On the 23d of *January, 1819*, the note was presented at the *Mechanics' Bank* in the city of *New-York*, to the first teller of the bank, and payment demanded; and it was answered that the note could not be paid for want of funds of the makers. On the evening of the same day, the clerk of the notary who made the demand and protest, put a notice into the post-office directed to *P. Smith, Utica*, and at the same time, put a notice into the post-office, directed to *M. Hunt*, cashier of the *Utica Bank*, and enclosed to him a duplicate notice for *P. Smith*, the endorser. The notice was dated 25th of *January*, in the usual form, stating that the note had been protested for non-payment, and that the holder would look to him for payment of the same, and was subscribed by the notary;

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Where a note is endorsed in blank, and the holder fills up the blank, directing payment to be made to a particular person, merely for the purpose of collection; and the agent returns the note, with the protest for non-payment, to such holder, he may strike out the special endorsement, and make it payable to himself, so as to bring an action in his own name against the endorser.

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A note made payable at the *Mechanics' Bank* in the city of *New-York*, was presented to the first teller of the bank, by the notary, 13 minutes past 3 o'clock, P. M. of the day on which it was payable, and payment demanded: *Held*, that this was a sufficient presentment, though the bank closes at 3 o'clock; it ap-

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pearing to be the usual course of doing business in the bank, to allow that time after banking hours, for the presentment and payment of notes; and if the defendant was at the bank on the day, and offered payment, it was for him to show that fact; but he is bound to wait until the usual time.

A demand of payment of a note by a notary, or a person having a parol authority for that purpose, or the lawful possession of the note, is sufficient: and the notary may give notice of non-payment to the endorser. (*Post*, 321.)

The holder of a note is not bound to give the earliest possible notice of its dishonor;

and it was proved that it was usual to date notices on the day succeeding the demand and protest, and when the note is protested on *Saturday*, to date the notice on *Monday*. The demand of payment was made about fifteen minutes past 3 o'clock, P. M.; and the witness stated that this was the usual hour to call for notes, although the bank closes at 3 o'clock, P. M.; that the officers of the bank were all present, and they never deliver notes for protest, until after the banking hours; that payment will be received even after banking hours, if the officers are present. When the note was presented for payment, and protested, there was the following endorsement on it: "Pay to the order of *W. Fish*, Esq. cashier, &c. *P. Smith*." "Credit *M. Hunt*, Esq." When produced in evidence at the trial, the words "Pay to the order of *W. Fish*, Esq." were obliterated, by drawing lines through them with a pen. The endorsements on the note were made merely for the purpose of collection and of safer transmission; and such was the mode used by the plaintiffs, in sending their notes to *New-York*. The *New-York* mail, by way of *Albany*, arrived at *Utica* late in the evening of the 28th of *January*, and after the western mail had closed. The notice to Mr. *Hunt* was delivered to him on the morning *of the 29th of *January*; and about noon of the same day, the notice which had been enclosed for *P. Smith*, was directed to him at *Peterborough*, *Madison county*, and put into the post-office at *Utica*. The letters and packages which arrived in the eastern or *Albany* mail, did not proceed in the western mail on the 29th of *January*, but lay over until the 30th. Letters from *Albany* and *New-York*, directed to *Peterborough* are daily sent by the way of *Utica*; and the western mail leaves *Utica*, every day, except Sundays. The mail is closed about eight o'clock in the evening, and the letters post-marked of the following day, being the day of the departure of the mail. The post-office at *Albany* is not a distributing office. Letters at the post-office in *New-York* are marked as of the day of the departure of the mail; and the letter to *M. Hunt* was marked the 25th of *January*, being *Monday*, and a letter deposited in the office on *Saturday* evening, would not be sent until *Monday*.

It was admitted, that the defendant resided at *Peterborough*, and that his place of residence was well known to the plaintiffs. The defendant's counsel objected to the plaintiff's right to recover, 1. That the note when presented for payment, and protested, was endorsed to *W. Fish*, and had never been re-endorsed by him; 2. That the demand and protest were out of season, irregular, and unauthorized; 3. That the notice was, also, out of season, unauthorized and insufficient. The judge overruled the objections, reserving the points. The defendant proved, that it was well known at the *Mechanics' Bank*, that he resided at *Peterborough*; that the mail from *Albany*, by the way of *Utica*, arrives at *Peterborough* twice

a week, on *Tuesdays* and *Fridays*; and that a letter, post-marked at *Utica* on *Friday*, the 29th of *January*, would arrive at *Peterborough* on the same day, but it must be put into the post office before the mail closes, on the 28th of *January*. That there is a mail from *Albany*, through *Cherry Valley* to the westward, two or three times a week, and that the defendant receives letters and papers from *New-York*, at all seasons, both by the way of *Utica* and *Cherry Valley*; that the distance from *Albany* to *Peterborough*, by the way of *Cherry Valley*, is about 15 miles less *than by the way of *Utica*. That there is a mail from *Madison*, on the *Cherry Valley* road, every *Friday*, to *Peterborough*, and a letter from *Albany*, on that road, in the mail on *Thursday*, would reach *Peterborough* on *Friday*. That there was, also, a mail from *Morris Flatts*, on the *Cherry Valley* road to *Peterborough*, every *Thursday*; and a letter which left *Albany* on *Wednesday*, on that road, would arrive at *Peterborough* on *Thursday*. It appeared that the notice received by the defendant was dated *January* 25th, 1819, post-marked at *New-York*, the 23d, directed to *P. Smith, Utica*, and re-directed to him at *Peterborough*, on the 29th of *January*, and post-marked at *Utica* on the 30th of *January*. There is a daily mail from *Albany* to *Utica*, which closes in the evening, but not at a fixed hour, as the mail is not made up until the other mails arrive, and are distributed.

The cause was tried at the *Oneida* circuit, in *June*, 1819, and the jury found a verdict for the plaintiffs, subject to the opinion of the court on a case containing the above facts.

N. Williams, for the plaintiffs. 1. The demand of payment was duly made, by a person who had authority for that purpose. Any person, as agent of the holder, and who has the note in his possession ready to be delivered up, when paid, may demand payment of it. (1 *Dallas Rep.* 193. 7 *Mass. Rep.* 486, 487.) *W.*, who made the demand, was a clerk to the notary of the bank in which the note was deposited for collection, and the protest is made in the usual and established form.

2. The demand was made in due time, according to the established commercial usage; it was within fifteen minutes after the usual banking hours, when all the officers of the bank were present. (*Chitty on Bills*, 286. 7 *East*, 385. 1 *M. & S.* 23. 6 *Mass. Rep.* 524. 12 *Mass. Rep.* 403. 13 *Mass. Rep.* 556. 14 *Mass. Rep.* 303.) A personal demand on the makers was not necessary. It was sufficient to inquire at the bank, the place appointed for payment, to know whether the makers had the money there; and the note was deposited in the same bank for collection. (*Saunderson v. Judge*, *2 *H. Bl.* 511. 7 *Mass. Rep.* 496. 12 *Mass. Rep.* 403. 13 *Mass. Rep.* 556. 15 *Mass. Rep.* 436.)

3. As to notice; it is a question of reasonable diligence, compounded of law and fact, and must depend on the circum-

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all that is required of him is ordinary and reasonable diligence. (a)

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(a) *Vide Moad, v. Enge*, 5 *Cowen's Rep.* 503. *Bank of Utica v. Snodde*, 3 *Cowen's Rep.* 602. *Bank of Utica, v. Davidson*, 5 *Wendell's Rep.* 587. *Bank of Geneva v. Howlet*, 4 *Ibid.* 308. *Cuyler v. Nellie*, *Ibid.* 398.

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stances of the case. (*Taylor v. Bryden*, 9 Johns. Rep. 173.) The holder is not bound to send the notice until the next day after the protest. (2 *Vaines's Rep.* 343. 3 Bos. & Pull. 599.) The objection is reduced to this, that had the notice been sent from Albany by another route, it might, possibly, have reached Peterborough sooner. But letters are as often sent to Peterborough by the way of Utica, as by Cherry Valley, or any other way. There is no fixed rule on the subject. It was proper for the agent to send the notice to his principal, that he might give notice to the endorser. (2 Johns. Cases, 1. 3 Johns. Cases, 89. 3 Bos. & Pull. 599.)

4. It is objected, that there having been a special endorsement by the cashier of the plaintiffs, directing the payment to be made to *W. Fish*, the plaintiffs cannot maintain an action on the note without an endorsement to them by *Fish*; or, in other words, that the plaintiffs had no right to strike out the special endorsement when the note was returned to them. The endorsement by the defendant was in blank, and was filled up by the plaintiffs, for collection merely, and for greater security. They continued to be the owners of the note. The distinction between blank and full endorsements is to be met with in all the books. (*Chitty on Bills*, 148, 149. 159. note. (Amer. ed.) 1 Dallas, 193. 2 Dallas, 147. Shower, 164. 10 Johns. Rep. 27. 11 Johns. Rep. 52. 1 Peters' Rep. 471. 15 Mass. Rep. 436.) In the case of *Dugan v. The United States*, (3 Wheaton's Rep. 172.) the Supreme Court of the United States decided, that the bill having been returned to the last endorser by his endorsers, was presumptive evidence of their having acted merely as his agents, and that when the case of agency is established, a receipt or re-endorsement of the bill, would be as unnecessary, as it would be unusual; that if a person who has endorsed a bill, for value received, or for the purpose of collection, comes into possession of it again, he will be regarded, unless the contrary is proved, as the *bona fide* holder and proprietor of the bill, and is entitled to recover, notwithstanding *there may be on it one or more endorsements in full subsequent to the one to him, without producing any receipt or endorsement back from either of such endorsers, whose names he may strike from the bill at his pleasure.

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Talcot, contra. 1. The plaintiffs had no legal right to strike out the special endorsement to *Fish*, and recover in their own names as endorsees. All the cases cited on the other side, are those in which the endorsements subsequent to that which conveyed the title to the plaintiffs, were allowed to be struck out. The engagement arising from a blank endorsement is, that any *bona fide* holder of the bill or note may fill up the blank as he pleases; when that is done, it will have the same effect as if it had been filled up originally by the endorser. When the blank is once filled up, the power is spent, and the endorsement can-

not be altered without discharging the endorser. When once filled up, it is as much the act of the endorser, the defendant, as if he had originally written it in full himself. If the holder cannot strike out an endorsement written in full, neither can it be done after the blank has been filled by the agent of the endorser, under the blank authority. (*Tyler v. Binney*, 7 Mass. Rep. 481. *Chitty on Bills*, 204.) The whole legal property in the note was transferred to *Fish*, who alone could sue on the note. (*Clerk v. Pigot*, 1 Saik. 126. S. C. 12 Mod. 193.) The case of *Clerk v. Pigot* is recognized by the Supreme Court of Pennsylvania in *Gorgesat v. M'Carty*, (2 Dallas' Rep. 144. 147.) which has been cited. (2 Burr. Rep. 227. 2 Str. 955.) Even if the note had been endorsed to *F.*, as a trustee merely, to receive the money for the use of the plaintiffs; yet *F.*, as the person having the legal title and interest, alone could bring the action. (*Lowell v. Everston*, 11 Johns. Rep. 52. *Chitty on Bills*, 139. 287, 288.) Though the plaintiffs had the equitable interest, they could not sue. (*Evans v. Cramlington*, *Carthew Rep.* 5.) In *Nevins v. Degrand*, (15 Mass. Rep. 436.) which has been cited, when the first suit was brought on the bill which had been accepted with a full endorsement, but which endorsement, before payment, was erased, the court held, that *Cabot* could not fill up the endorsement *so erased, and make it payable to himself, so as to maintain an action in his own name, though they, afterwards, allowed the original endorsers, whose names had been erased, and who had since become the owners of the bill, by paying *C.* the amount, to restore their names as endorsers, and bring their action against the acceptor.

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2. The demand of payment was out of season. Presentment should be made, in all cases, at the usual hours of business. (*Chitty on Bills*, 286. (Am. ed.) *Barclay v. Bailey*, 2 Campb. N. P. Rep. 527. 2 Taunt. Rep. 223, 224.) It is said here is a particular usage of the banks of New-York, which creates an exception to this general rule. This usage was not sufficiently shown; it ought to be proved and brought home to the knowledge of the party. But can a bank create an usage to vary the general law of merchants? The contract is, that the maker of the note will be ready at the day and place appointed, to pay his note; not that he will pay money into the bank, to be applied by its officers for the payment of the note, if deposited there. He is not bound to remain after banking hours; a presentment, therefore, after the doors of the bank are closed, though the officers may be present for their own concerns, is too late. In *Elford v. Teed*, (1 Mau'e & Selw. 28.) a bill payable at a particular banking house, was presented by a notary's clerk, after the banking house was shut, to a servant at a private door. The Court of K. B. held that this was not a sufficient presentment, and that the circumstance of the bill having been presented by a notary, was not sufficient to authorize the jury to presume

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that it had been before duly presented within banking hours Lord *Ellenborough* said, "There was not any text writer upon whose authority a presentment of a bill by a notary at a house of business after it was closed, could be sustained. It is laid down by *Marius*, (2d ed. 187,) that it must be made during times of business, at such seasonable hours as a man is bound to attend, by analogy, to the *hora juridica* of the courts of justice."

It is said that the defendant ought to have shown that he was at the bank on the day, ready to pay the note. But it is incumbent on the plaintiff to allege and prove every thing necessary to entitle him to recover; and it is the duty of *the holder to show that he was at the bank, and demanded the money of the defendant. (13 *Mass. Rep.* 559.)

Admitting, however, that the demand was made in season, yet it was not made by a person authorized to require payment. The note being specially endorsed to *F.*, he alone, or some person authorized by him, could make a demand; (*Chitty on Bills*, 265. 1 *Esp. N. P. Cases*, 115. 7 *Mass. Rep.* 487.) and the authority must appear. Here was no authority, verbal or written. It is said that the notary's clerk who had the note, was, *prima facie*, a *bona fide* holder: true, if the note had been endorsed in *blank*; but not when endorsed to *F.*, for the special endorsement repels that presumption. Possession of a bill or note specially endorsed, is no evidence of property in the holder. (2 *Dallas*, 146. per *Bradford, J.*, *Doug.* 611.) The demand being made by a notary's clerk, is immaterial; for a notary has no more power to demand payment of promissory notes or inland bills, than any other person. A protest by a notary is not necessary, except in case of a foreign bill of exchange. The demand was made not by the request of *Fish*, but by the direction of *Hunt*.

3. The notice of the non-payment of the note to the defendant was irregular, and insufficient: It was sent by a person not authorized to give it. Notice should have come from the holder, or some person having an interest in the note. (*Stewart v. Kennett*, 2 *Camp. N. P. Rep.* 177.) In *Tindal v. Brown* (1 *Term Rep.* 167, per *Ashurst, J.* and *Buller, J.*) it was decided, that the notice must come from the holder of the note; that what is a reasonable notice of the dishonor of a bill or note, was a question of law. (11 *East*, 114. 117.) Notice means something more than *knowledge*, for the holder may give credit to the maker or acceptor. Lord *E'don*, in the case *ex parte Barclay*, (7 *Vesey*, 597.) said, that the settled doctrine was according to the language of Mr. Justice *Buller*, in *Tindal v. Brown*, and that it had been acted on ever since. (*Bayley on Bills*, 71. 83. *Kyd on Bills*, 125, 126. *Chitty on Bills*, 239. 14 *Mass. Rep.* 116. 120.) But admitting that the notary had authority to make the demand, and give the notice, it was, nevertheless, insufficient, because it was not properly directed; and it is not shown that

any attempt was made to ascertain the defendant's place of residence, and to *send the notice to him by the most direct route. The rule as laid down by Lord *Alvanley*, in *Haynes v. Birks*, (3 Bos. & Pull. 599.) is not denied; but that rule was adopted for the convenience of *bankers* in *England*; if the matter were *res integra*, it might be shown that the inconvenience of the rule was so great as far to outweigh that consideration. Suppose the *maker* and *endorser* of a note reside in *New-York*, and the *holder* of it, at *Calcutta*, sends the note to his agent in *New-York* to be collected, who demands payment, which is refused; is the agent then, according to the doctrine of Lord *Alvanley*, and the Court of *C. B.*, to send the note and protest to his principal in *Calcutta*, that he may give notice to the endorser in *New-York*? Besides, in this case, *Fish* was the holder, or principal, and the notary should have sent the note and protest to him, that he might give notice to the defendant. The notice ought to have been sent by the way of *Cherry Valley*. It was proved, that had it been sent direct to *P.* and by that route, the defendant would have received it two days sooner. Where there are two ways of sending a notice, by one of which it *may* be received sooner than by the other, the endorser is entitled to insist on having it sent by the shortest and most expeditious route.

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Williams, in reply, said, that a blank endorsement makes a bill or note transferable by mere delivery; and is an authority to the holder to fill it up. If he fills it up merely for the sake of collection, and not with a view to transfer his property in the note, and his agent returns the note to him, he may strike out the special endorsement, and insert his own name for the purpose of bringing an action as endorsee. The case of *Dugan v. The United States* was in point. The court there looked into the real nature and truth of the transaction. It is not pretended that the plaintiffs in this case are not the true and lawful owners of this note. Why, then, require that the suit should be brought in the name of *Fish*, a mere agent, who has no interest whatever in the note? The inconveniences of such a rule may be very great.

*SPENCER, Ch. J., delivered the opinion of the court.—The defendant is sued as *first* endorser of a note for 10,000 dollars, drawn by *Sulden & Smith* and *A. Van Santvoord*, to the defendant or order, dated *July 20, 1818*, and payable six months from the date, at the *Mechanics' Bank* of *New-York*. Over the name of *Peter Smith* there was written, when the note was presented at the *Mechanics' Bank*, "pay to the order of *W. Fish*, Esq. cashier," &c. This endorsement was thus filled up for the safety of transmission by the plaintiffs' direction, who were the owners of the note, *Fish* never having had any interest in it. The endorsement was afterwards erased, and

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the note directed to be paid to the plaintiffs. This gives rise to the first question: whether the plaintiffs had a right to erase the endorsement to *Fish*, and to fill it up to themselves? It appears clearly that *Fish* never had any interest in the note. It was sent to him merely to collect, and not being paid, he sent it back. He was the mere servant or agent of the plaintiffs; and it is, I think, clearly settled, that in such a case the plaintiffs had a right to strike out the transfer, and make the bill payable to themselves. (3 *Wheat. Rep.* 182. 1 *Dall. Rep.* 193. 2 *Dall.* 147. 15 *Mass. Rep.* 436. 1 *Show. Rep.* 164.)

2. The bill was properly presented at the bank for payment; and although it was a quarter of an hour after the usual time for closing the bank, as to other business, it was yet within bank hours; for it appears that these 15 minutes, according to the general course of doing business at this bank, was the usual and accustomed time for such presentments; and of the course of doing business there, the defendant ought to have informed himself. (7 *East Rep.* 385. 1 *Maule & Selw. Rep.* 29. 3 *Bos. & Pul.* 599.) If the defendant had been at the bank, and offered payment, or made inquiries for his note, it was for him to have shown it; but it was his duty, also, to have waited until the usual time: (a)

3. Notice of protest and non-payment was given by *J. T. Irving*, notary public, to the defendant, with notice that the holder looked to him for payment.

It is objected, that *Fish* only could make demand or give notice.

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The note was in the possession of the notary when payment *was demanded. He received it from *Fish*, who had full power to deliver it to him for that purpose. A demand of payment by an agent having any parol authority, or the mere possession of the paper, is sufficient (b) (7 *Mass. Rep.* 486. 9 *Mass. Rep.* 423, 427.) It is true, that where it is necessary for the party paying to have evidence of the authority of the person demanding payment, to justify him in making the payment, then the authority ought to be in writing, and properly authenticated; but where the possession of the evidence of the debt denotes the authority, and is ready to be surrendered on payment, it is not necessary to have any special authority. Besides, although the law does not require the intervention of a notary to make a demand of payment, or to give notice of the non-payment of a note, yet these officers are in the practice of doing so; and, being commissioned by the government, their official acts are of a more solemn nature than those of individuals: For the same reasons, a notice of non-payment by a notary is, also, available; and it is the constant and uniform course, sanctioned by a long and continued usage.

4. The last point is equally untenable. The transmission

(a) Vide *Caldwell v. Cassidy*, 8 *Cowen's Rep.* 271.

(b) Vide *post*, 329, *Stafford v. Yeates*.

of the notice to the defendant at *Peterborough*, by the way of *Utica*, under cover to *Hunt*, cashier of the bank of *Utica*, was sufficient. It is in proof that letters sent to the defendant went through the post office in *Utica*. It appears that letters for the defendant from *New-York*, are sent both by the way of *Utica* and by the way of *Cherry Valley*, indiscriminately, and that in point of fact, the notice was not delayed by being put under cover to Mr. *Hunt*. This presents a question of due diligence; and even if it be admitted that the notice would have reached the defendant a day or two sooner, had it been sent by the way of *Cherry Valley*, it does not prove that there was *laches*, or unreasonable delay in giving notice.

I consider the mode adopted in this case in the same light as if the notary had sent a notice directed to the defendant, *via Utica*; in which case, I can conceive no possible objection to the notice, for it is expressly in proof, that it was as usual to send letters to the defendant by the way of *Utica*, as by the other route. The law does not exact of the holder of a note or bill, that he shall give the earliest *possible notice of its dishonor. It requires of him only an ordinary and reasonable diligence. Suppose notice is to be sent from *London* to an endorser of a bill in *New-York*, of its dishonor, and that two vessels set sail on the same day, one of which sails faster than the other, would not a notice sent by the slowest sailer be well sent? Yet the probability that it would arrive sooner, had it been transmitted by the other vessel, would be quite as strong as that this notice would have reached the defendant sooner, had it been sent by *Cherry Valley*. It would be alarmingly critical to hold the party bound to give notice to such rigid rules; and I am not apprized of any case in which the courts have adopted them. We require, when notice is sent by post, that it be sent to the post office in the town where the party resides; but where he is nearer to a post office in an adjoining town, and more frequently resorts there to transact his business, we have said, that notice was well directed to such post office. The endorser must have the chance of receiving notice in a usual and customary manner; and here he had that chance.

Woodworth, J., concurred on all the points raised in this cause, excepting on the question of notice, which he considered defective. *Smith* resided at *Peterborough*, in *Madison* county; it was competent for the holder to send notice through the post office, directed to the post office nearest to the defendant, according to 16 *Johns. Rep.* 221. There were two routes from *New-York* to *Peterborough*, one by the way of *Cherry Valley*, the other by the way of *Utica*; and although it appears the defendant received letters from *New-York* by both routes, it is in proof, that the distance by the way of *Cherry Valley* is considerably less than by the way of *Utica*, and

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that letters coming from *New-York* by the *Cherry Valley* route, reach *Peterborough* as soon as by the way of *Utica*, even if they do not lay over at *Utica*. In the present case, if the notice forwarded to the cashier at *Utica* had not lain over one mail at that place, (as it did by reason of the lateness of its arrival,) it would have arrived at *Peterborough* on *Friday*, but it did not arrive until *Tuesday* following. The evidence of *Bunce* shows, that had the notice been sent *by *Cherry Valley*, it would have arrived as early as *Friday*, and thereby apprised the defendant of his liability, three days sooner. If the holder seeks to charge the endorser, by notice through the post office, and there are two routes, he cannot arbitrarily, or for his own convenience, designate a particular route by which the mail is conveyed, unless he can show that the notice arrived as soon as if sent by the other: he has not only failed to do this, but it expressly appears, that had the notice been directed to the defendant at *Peterborough*, it might have been received at an earlier day. He considered it no answer to say, that the defendant received letters by both routes. The forwarding of letters from the post office at *Albany*, sometimes by *Utica*, and sometimes by *Cherry Valley*, could not vary the duty of the holder at *New-York*; his course was distinctly marked and defined. Had the notice sent been directed to *Peterborough*, it is at least equally probable it would have been forwarded by *Cherry Valley*. The holder, by his act, deprived the defendant of the chance of receiving the earliest information, and he cannot complain, if for this cause, his notice is considered bad. It is not the application of a new and rigorous rule; but requiring the observance of a rule well established; and as the holder by his own act has chosen to depart from it, he has thereby discharged the endorser.

Judgment for the plaintiffs.

In the matter of BRIGHT *against* THE SUPERVISORS
OF THE COUNTY OF CHENANGO.

A *mandamus* lies to the supervisors of a county, to compel them to allow [* 243] the account of the clerk of the county, for advances made by him in purchasing books for recording deeds and mortgages,

AT the last *January* term, on motion of the plaintiff, a rule was granted, requiring the defendant to show cause, on the first day of the next term, why a *mandamus* should not issue, commanding them to allow the account of the plaintiff as *a legal charge against the county, &c., the board of supervisors having refused to allow it. The plaintiff was clerk of the county, and had purchased books for recording deeds and mortgages, and for the entry of common rules of the Court of *Common Pleas*, and performed other services required of him by law as clerk, as sending notices to judges and justices, of
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pedlars' licenses, and for which no specific compensation was provided by law. (1 N. R. L. 369. 372. *Acts concerning Deeds and Mortgages*, 1 Rev. Stat. 756, &c. 2 N. R. L. 228. *Act to restrain Hawkers, Pedlars, &c.* sess. ch. 9. s. 3. 1 Rev. Stat. 168.)

The account, amounting to 172 dollars, 13 cents, was presented to the board of supervisors at their annual meeting, in October, 1819, and the plaintiff claimed to have it allowed by them. The supervisors admitted that the several items of the account were correctly made, but refused to allow it, on the ground of its not being a legal charge against the county. The plaintiff again presented his account at the last meeting of the board, previous to January term, 1820, and claimed to have it allowed; but the supervisors refused to allow it.

After the rule to show cause was obtained, the counsel agreed to a case, containing the facts above stated, which they submitted to the court, without argument, on the points stated by them.

Birdsall, for the plaintiff.

L. Clark, for the defendants.

WOODWORTH, J., delivered the opinion of the court. The plaintiff was clerk of the county of Chenango, and had purchased books for recording deeds and for the entry of common rules, and had rendered other services as clerk, for which no specific compensation is provided by law. By the statute (2 N. R. L. 137. sess. 36. ch. 49. s. 1. 1 Rev. Stat. 386.) the supervisors are directed "to examine, settle, and allow all accounts chargeable against the county, and ascertain what sum ought to be raised for the payment thereof."

It is admitted that the plaintiff has advanced his money for the books, and performed the services, as charged; the claim for compensation is highly equitable, and presents a strong case for relief, in some shape. The question is, whether the defendants are liable, by the provisions of any existing law. The legislature have prescribed the duties of clerks, and, among other things, they are directed to procure the necessary books for recording deeds and mortgages, and to perform the services charged by the plaintiff; but the statute does not provide for the payment. It does not follow from the silence of the statute in this respect, that the legislature intended that the clerks should make the advances without being remunerated, particularly when it is considered that the books are not for the benefit of the officer, but the public; that the advances necessary to be made are considerable; that the tenure of office is during pleasure, and the emoluments in most cases moderate, and in some very trifling. A construction productive of injustice must be rejected, unless rendered inadmissible by the

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&c. and for sending notices to judges and justices of the peace, of the pedlars who are licensed, with interest on such advances. Such services being required by law of the clerks, and no specific compensation provided for them, are properly chargeable to the county, and ought, therefore, to be allowed by the supervisors and paid according to the act, (sess. 36. ch. 49. s. 1. 2 N. R. L. 137. 1 Rev. Statutes, 386.) for defraying the public and necessary charges in the respective counties, &c. (a)

(a) *Vido Hall v. Supervisors of Oneida*, 19 Johns. Rep. 259. Ex parte *Nelson*, 1 Cowen's Rep. 417. *Supervisor, &c. of Sandlake v. Supervisor, &c. of*

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Bulin. 2 Cowen's Rep. 485.

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plain language of the law ; neither can this be considered a *casus omissus*, and, therefore, a proper subject for legislative interposition. It is, in my judgment, to be viewed in a different light. The books directed to be procured become permanent records, and are the property of the county. Although not exclusively, they are chiefly for the benefit of the county ; the clerk is bound to transmit them to his successor. The successor is not bound to pay the preceding clerk, and hence it follows, that if no compensation is to be made, it becomes a game of chance between the different incumbents. The one who comes in after books are provided, and retires before new ones are necessary, will find it an office of profit, while the predecessor who purchased the books, and is shortly thereafter removed, may not have realized sufficient to equal his actual advances. Such injustice has not received the sanction of law, but is guarded against by requiring the supervisors "to allow all accounts chargeable against the county." The authority is general, and was intended to embrace every case where the service rendered was specially for the benefit of the county, and for which other provision had not been made. The present case is clearly one of that description, so far as it respects the books purchased. The charge for notifying the several judges and justices of the county, of the *names of persons to whom pedlars' licenses have been granted, is for services required by law to be performed by the clerk. The object of this notice is to insure the collection of the penalty against pedlars trading without a license ; the penalty when collected, is given, the one half to the informer, the residue to the poor of the town : thus the several towns in the county may be benefited, and, no doubt, have been benefited by penalties recovered under this act. The notice given by the clerk is almost indispensable to enable the magistrates to detect offenders ; and if so, was not the service rendered for the benefit of the county ? I am of opinion that it was ; and that it forms a just charge, which the defendants were bound to allow, together with interest on the moneys advanced. The rule to show cause why a *mandamus* should not issue, must be made absolute.

SMITH against ALLEN.

Where two persons are jointly concerned in a contract of sale, their interest may be severed by a parol agreement, on good consideration ; and one

THIS was an action of *assumpsit*, tried at the *New-York* Sittings, in *April*, 1819, before Mr. Justice *Yates*.

The counsel for the plaintiff, in opening the cause, stated that the action was brought to recover the sum of five thousand dollars, being the amount of a mistake made by the defendant in charging the plaintiff with two sums of five thousand dollars each, mentioned in two receipts, the one signed

by *Janna Taylor*, the agent of the plaintiff, and the other by the plaintiff, each bearing date the 29th *October*, 1814, when only one of them ought to have been charged to the plaintiff. That *William D. Cheever* was a contractor for the army on the north-western frontier, the plaintiff a sub-contractor, and the defendant a general agent of the contractor. That on the 29th of *October*, 1814, in addition to sundry advances during that month, the defendant delivered to *J. Taylor* at *Canandaigua*, a draft on *Isaac Townsend & Co.*, *merchants in *Albany*, in favor of *A. Dor*, for five thousand dollars, and took from him a receipt for the sum of five thousand dollars. That it was the understanding between the plaintiff and defendant, that when the receipts of *Taylor* were taken, the receipts of the plaintiff were to be substituted in their stead; and accordingly, the plaintiff gave to the clerk of the defendant, at *Buffalo*, where the business was transacted, and the accounts settled, a receipt drawn by the clerk, dated at *Canandaigua*, for the draft which was intended as a substitute for the receipt of *Taylor*. That in the settlement of the accounts between them, in *October*, the receipts of *Taylor*, for the five thousand dollars, and the receipt of the plaintiff, for the draft for the same sum, which was given as a substitute for the receipt of *Taylor*, were both charged to the plaintiff, by mistake.

Taylor was then called as a witness on the part of the plaintiff; but he was objected to by the counsel for the defendant, on the ground that he was a co-partner with the plaintiff in the contract made with *Cheever*, and in the transaction in relation to which he was called to testify. To show this, he called *James S. Whyte* as a witness, who testified, that in a conversation at which *Taylor* and *Smith* were both present, on the 29th of *July*, 1814, they admitted that they were concerned together in the contract which *Smith* had made with *Cheever*; and the judge thereupon rejected *Taylor*, on the ground of interest. The plaintiff's counsel then called the son of the plaintiff, who testified, that the plaintiff purchased *Taylor's* interest in the contract, for the defendant; and that *Taylor* was afterwards employed as the agent of the plaintiff, at two dollars per day. The judge then decided that *Taylor* was a competent witness, and he was accordingly sworn. *Cheever* and several other witnesses were also sworn and examined, and numerous receipts, accounts and vouchers were produced and proved, which evidence it is unnecessary to state here, as the material parts will be found in the opinion delivered by the court. It was agreed that the suit was commenced in *December*, 1816, after the verdict was obtained in a cause brought by *Cheever* against the plaintiff. (*Vide* 15 *Johns. Rep.* 276.) The jury found a verdict for the plaintiff, for 6,581 dollars, damages.

*A motion was made to set aside the verdict, and for a new trial.

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of them, after this dissolution of their joint concern, is a competent witness.

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ness for the other, in relation to a matter growing out of such contract; such witness having parted with all his interest in the contract.

After a trial and verdict for the plaintiff, it is too late for the defendant to object, that the subject matter of the suit was a co-partnership contract between him and the plaintiff. The objection ought to be made at the trial.

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T. A. Enmet and D. B. Ogden, for the defendant.

Wells, and P. W. Radcliff, for the plaintiff.

WOODWORTH, J., delivered the opinion of the court. *Janna Taylor*, called as a witness for the plaintiff, was objected to as interested, and admitted by the judge; the question now is, was he competent? It appears, that in *July*, 1814, *Taylor* was concerned with the plaintiff in the contract made with *Cheever*; but in *September* following, according to the testimony of *John M. Smith*, the plaintiff bought out *Taylor*, for the defendant, as the witness understood, and afterwards employed him, at two dollars a day, and paid him accordingly. I perceive no well-founded objection to the sufficiency of this proof; it is no where contradicted, and although no writings are signed, *Taylor's* interest might be severed by a parol agreement founded on good consideration. The witness is not to be discredited, because the parties have not chosen to dissolve their connexion in the most usual way; besides, one fact is stated, which very satisfactorily shows, that *Taylor's* situation was changed. From an acknowledged partner, he afterwards appears in the character of an agent, at a *per diem* allowance, which he received. The proof, then, of dissolution, was sufficient. But, it is said, *Taylor's* interest was purchased for the defendant, and, therefore, the action cannot be sustained, because, in that event, the plaintiff and defendant became partners. (a) What weight there would have been in this objection, had it been made at the trial, we need not inquire. It is too late to be now urged, for the first time. The application should have been for a nonsuit, that the cause might have been arrested as soon as the discovery was made; the omission must be considered a waiver.

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**Taylor*, then, being a competent witness, and *Smith's* testimony not establishing any fact, that, in this stage of the cause can be relied on to defeat the plaintiff's action, the inquiry is, whether the verdict is against law, or the weight of evidence.

In the case of *Cheever v. Smith and others*, (15 *Johns. Rep.* 276.) the plaintiff now claimed an allowance for 5,000 dollars, charged to him on the 29th day of *October*, 1814, by the defendant, who was *Cheever's* agent, when in fact it had not been received. This claim was objected to, on the ground, that no notice of the alleged mistake had been given to *Cheever* previously to his settlement with *Allen*, in *July*, 1815, at which time, after allowing him the 5,000 dollars in question, there appeared to be a large balance due, which *Cheever* paid. The principle decided by the court in that case, is this: "If a man deals with another's agent, and gives the agent a receipt

(a) Vide *Murray v. Bogert*, 14 *Johns. Rep.* 318. *Marquand v. New-York Manufacturing Company*, 17 *Johns. Rep.* 525.

for a sum of money which he had a right to pay, and on the faith of that receipt the principal settles with his agent, and pays him money, the party giving the receipt cannot lie by until after the settlement between the principal and the agent, and then charge the principal with the payment of the same sum again. *Allen* is answerable to the defendant, as for money had and received, if it can be shown that he has been allowed 10,000 dollars, as paid to the defendants, when only 5,000 dollars were received by them." From this decision, it appears, that the count for money had and received is adapted to the present case; and the only remaining question is, whether there is sufficient evidence of the mistake alleged, to warrant the finding of the jury. At the trial, oral and written testimony were produced on both sides. It is not probable, that any new light would be thrown on the subject by a second trial. Be that, however, as it may, if the weight of testimony is with the verdict, it ought not to be disturbed, to admit the chance of trying the complexion of the cause before another jury. On the 29th day of *October*, 1814, *Taylor*, as agent of the plaintiff, received of the defendant a draft on Messrs. *Isaiah Townsend & Co.*, in favor of *Abraham Dox*, on which, *Taylor* received the money from *Dox*, and on the same day, at *Canandaigua*, gave to the defendant *a receipt for 5,000 dollars. The plaintiff was then absent at *Buffalo*. The arrangement was, that when receipts were given by *Taylor*, they were not to be charged to the plaintiff, but were to be taken up by him, and his receipts substituted in their place. In the present instance, that arrangement did not probably take place; and if the mistake of 5,000 dollars was made, I think it must have happened in this way: the plaintiff having given to *Allen* a receipt for the same amount, and of the same date, and for the same money that had been paid to *Taylor*, neglected to take up *Taylor's* receipt at the time, and *Allen* holding two receipts for the same sum, and finding, that by his entries the clerk had charged *Taylor's* receipt, (although contrary to the stipulation,) as well as that given by the plaintiff, may have been led into a misapprehension; and believing that 10,000 dollars had been advanced, when, in fact, there had been no more than 5,000 dollars, afterwards in his settlement with *Cheever*, produced these vouchers as evidence of his disbursements, and had them allowed. After the recovery by *Cheever* against *Smith*, the receipts were probably delivered over to the plaintiff, for the purpose of enabling him to detect the error, if any existed. I have indulged in this conjecture, because it no where appears in the case, how the plaintiff came to the possession of *Taylor's* receipt. If it should be urged that when the plaintiff gave a receipt for 5,000 dollars, *Taylor's* receipt was taken up by him, I answer, this is not probable, because it was a necessary document for *Allen* to produce in his settlement with *Cheever*, if he claimed an

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allowance for both receipts. The general receipt, given at the end of the month, will not cover this sum, as will appear by an examination of the several charges made in the month of *October*, 1814. It appears, then, that a receipt bearing date, *Canandaigua*, *October* 29th, 1814, was given by *Smith* to *Allen*, for a draft on *I. & J. Townsend*, in favor of *Abraham Dox*, for 5,000 dollars. Was not this intended as a substitute for the one given by *Taylor*? I think the evidence establishes this fact, *prima facie*, and that nothing has been made out by the defendant to disprove it. In the first place, it is rendered probable that it was for the same payment, because it *was agreed to exchange, and it may well be presumed that this was done in pursuance of such agreement; but a more conclusive reason is this: *Taylor's* receipt, although not so expressed, was, in fact, given for a draft on the *Townsend*s, in favor of *Dox*. *Smith's* receipt admits a draft in favor of the same person, and for the same amount, and dated on the same day. *Smith*, at the date, was at *Buffalo*, 90 miles distant. The presumption is strong, that it must have been signed subsequent to the day it bears date; and if so, why was it made to correspond with the date of the receipt given by *Taylor*, unless intended to be a substitute for it? If, in truth, *Smith's* receipt is for a distinct sum, *Allen* has not afforded any explanation for giving a date to the transaction different from the true one. But again; *Smith's* receipt was for a draft on *I. & J. Townsend* in favor of *Dox*, and for 5,000 dollars—so was *Taylor's* receipt. How does it appear that they were in every respect similar? If not intended as vouchers for the same sum, why were they not included in one receipt for 10,000 dollars? It no where appears that two drafts for 5,000 dollars each, were drawn in favor of *Dox* on the same day, or at any time. It is highly improbable that there should be. The presumption is, that both are for the same advance, and the defendant was called on to repel the presumption. Why did he not prove, by *Dox* or the *Townsend*s, that two drafts were drawn, bearing the same date and for the same amount? This might have been done, it is fairly presumable; and the on-production of this testimony, in my mind, makes against the defence, until further explanation is given. I cannot disapprove of the verdict, but, on the contrary, I entirely concur in the conclusion the jury have drawn.

The intrinsic evidence in this case, arising from the transaction, goes far to show, that a mistake has happened; the conduct of the parties is altogether at variance with the supposition, that ten thousand dollars were paid on the 29th of *October*, 1814. There is another fact established by the testimony of *Fort*, which I think important; he says, that “the general receipts, at the close of each month, formed the aggregate of the several receipts, which had been obtained for the moneys advanced, not only to the plaintiff, but *to *Janna*”

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Taylor, during the course of the month, and were then consolidated, for the purpose of simplifying the accounts between the parties, and preventing mistakes." Now, according to this, we expect to find the general receipt for the month of *October*, 1814, of an amount sufficient to include both the receipts for 5,000 dollars, if in truth both sums had been advanced. But the fact is otherwise. It appears by the statement of advances in the hand-writing of *Fort*, the defendant's clerk, for the month of *October*, 1814, that including two sums of 5,000 dollars, charged on the 29th of *October*, the whole amount would be 19,800 dollars. But the general receipt, given *October* 31st, 1814, which *Fort* says included all the receipts given for the month, is only 12,396 dollars and 18 cents. If this be so, then it is evident that all the sums charged by *Fort* were not allowed and included in the general receipt. Some of them must have been struck out.

From the facts made out in this cause, may we not fairly presume, that of the sums not included, the 5,000 dollars receipted was one? But it is contended that *Smith*, in *February*, 1815, on being questioned, said he was satisfied the mistake was his, and he had been in an error respecting the 5,000 dollars. *Hamlin*, a witness who was present, heard the conversation, but did not hear the amount of the mistake mentioned. Allowing that *Whyte* is correct in supposing the conversation referred to the mistake of 5,000 dollars, and not to the sum of 1,000 dollars, respecting which there had been some suggestions, I think it vague and unsatisfactory. Acknowledgments or confessions are a species of testimony requiring strict scrutiny, and to be received with caution.

Besides, it will be remembered, that in *January*, 1815, the defendant's clerk requested the plaintiff not to mention the alleged mistake to *Mr. Thorn*, one of the principals, who was concerned with *Cheever*, as he did not wish the report of a mistake to be circulated. This may have been one cause that the plaintiff denied it to *Whyte* in the *February* following. *Fort* further says, that the plaintiff continued to insist on the mistake; from all which there is reason to believe there was some misapprehension on the part of *Whyte*, the witness.

*I do not perceive that any inference unfavorable to the plaintiff can be drawn on account of this suit not being commenced earlier.

Smith claimed an allowance for the 5,000 dollars, in the suit with *Cheever*, and shortly thereafter commenced this action.

After an attentive examination of the facts, I have not discovered any ground for saying, that the verdict is either against law or the weight of evidence. The motion for a new trial must, therefore, be denied.

New trial denied.

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LUDLOW against HACKETT.

Where a defendant obtains a discharge under the act for the relief of debtors with respect to the imprisonment of their persons, (1 N. R. L. 348. 2 Rev. Stat. 28.) or under the act to abolish imprisonment for debt, in certain cases, passed April 7, 1819, (sess. 42. ch. 101) the plaintiff may discontinue his suit without paying costs; but if the plaintiff, knowing of the defendant's discharge, proceeds in the cause, he must, if he afterwards

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discontinues,
pay the costs
accruing since
the discharge.

THE defendant was arrested in *May*, 1819, at the suit of the plaintiff, for 2,000 dollars; and in *July* following, was regularly discharged, under the act to abolish imprisonment for debt, in certain cases, passed *April* 7, 1819. (sess. 42. 101.) After the discharge, the attorney for the plaintiff entered the default of the defendant for not pleading, and afterwards entered an interlocutory judgment, and had the damages assessed, on a writ of inquiry. The inquest was set aside in *May*, term with costs, on the ground that the damages assessed were on a partnership account of the plaintiff and one *Lambert*. In *June*, the plaintiff's attorney entered a rule for a discontinuance, and gave notice thereof to the defendant's attorney, on the ground of the defendant's discharge as an insolvent debtor under the said act; but refused to pay costs. The defendant's attorney then gave notice, that unless the plaintiff proceeded to execute a writ of inquiry in the cause, in thirty days, a motion would be made for judgment of *non pros*. A motion was accordingly made for a judgment of *non pros*.

T. A. Emmet, for the defendant.

**Garr*, contra.

Per Curiam. In *Heffernan v. Brown*, we decided, at the last term, that where a defendant obtains a discharge under the act giving relief in cases of imprisonment, the plaintiff might discontinue his suit without costs, in the same manner as if the defendant had been discharged from all his debts under the insolvent act. If the plaintiff, knowing of the defendant's discharge, will, nevertheless, go on with the suit, he must, if he afterwards discontinues, pay costs. Let the plaintiff have leave to discontinue his suit on payment of the costs of suit since the defendant obtained his discharge under the late act, and up to the time of the entry of the rule for a discontinuance, exclusive of the costs of the application made at the last term.

Rule accordingly.

ROOSEVELT and others, against W. & L. CROMMELIN.

Proceedings in outlawry, in a bailable action, will not be reversed on motion and affida-

THE defendants were natives of *New-Jersey*, and came to the city of *New-York* about the year 1811, where they were engaged in the mercantile business, until the year 1815, when they removed to *Granville*, in the state of *Mississippi*, where

they permanently settled, and have since resided and carried on business. It was stated in the affidavit, that the intention of the defendants to remove to *Mississippi*, for the purpose of forming a commercial establishment there, was well known to the plaintiffs, and to the public generally; and that their removal was not secret, or with any intent to avoid civil process. That the plaintiffs having commenced a suit against the defendants, on certain bills made in the state of *Mississippi*, to recover 2978 dollars, and 41 cents, had proceeded to *outlawry* against the defendants, and that writs of *exigent* and *proclamation* had been awarded, the latter of which had been published in the newspapers, *pursuant to the statute, for regulating outlawries. (1 N. R. L. 165.)

R. Sedgwick, for the defendants, now moved to set aside the proceedings in *outlawry*. He contended, 1. That the defendants, not being citizens or inhabitants of this state, but residing in another state, no process of *outlawry* would lie against them. "Outlawry," says *Sellon*, (*Sell. Pr.* 387.) "is a punishment inflicted on a person for a contempt and contumacy, in refusing to be answerable to, and abide by, the justice of that court which hath lawful authority to call him before them, and, as this is an offence of the highest nature, being an act of rebellion against that state or community of which he is a member, so doth it subject the party to divers forfeitures and disabilities; for hereby he loseth *liberam legem*, is out of the king's protection," &c. (*Co. Litt.* 128. *Roll. Abr.* 802. *Dr. & Student Dia.* 2. C. 3.) Outlawry is a proceeding in *personam*: it is in the nature of civil process, to compel an appearance to a suit. It lies only where a defendant is *abroad*, or *keeps out of the way*, or *absconds*, or *secretes himself*, so that he cannot be arrested. (*Tidd's Pr.* 125. 3 *Bl. Com.* 283, 284. 2 *Sellon*, 389.) How can it be said, that an *alien*, or a *citizen* of another state, or country, acts in contempt of the law of this state, or rebels against its authority, or absconds or *secretes* himself to avoid the process of its courts? A defendant who is outlawed is called *utlagatus*, an *exlex*; but how can a person who was never *within* the law, be said to be put out of its protection? But those who were not *sworn to the law*, (as infants under twelve years of age, or a woman,) by taking the oath of allegiance at the *court leet*, or *sheriff's tourn*, could not be *outlawed*; but were said to be *waived* or *derelict*. (*Tidd's Pr.* 125. *Co. Litt.* 128. a.) In *Reilly v. O'Connor*, (*Barnes's Cases*, 325. 2 *Sellon's Pr.* 414.) it was decided, that if a defendant is *abroad*, *bona fide*, upon business or the like; and, in other respects, is a public visible man, the plaintiff cannot commence process of *outlawry* against him. But if the defendant goes beyond sea, after the *teste of the exigent*, he may be regularly outlawed. (4 *Roll. Abr.* 84. *Barnes's Cases*, 321. 2 *Sellon*, 414.)

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rit, because the defendant was not a citizen of this state, but resided in another state, or in a foreign country, unless the defendant

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will put in special bail, on a writ issued by the plaintiff in a new action; but the defendant will be left to bring a writ of error, if he pleases. (a)

(a) Vide *Dunlap's Practice*, 147.

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*2. The proceedings being erroneous, they may be set aside on *motion*, or reversed by writ of error. (*Tidd's Pr.* 138, 139.) By the statute, (s. 9.) the defendant may reverse the outlawry, without bail, in all cases, except where special bail is ordered by the court. If the defendant comes in at the return of the exigent, he stands as at common law, and may have the proceedings reversed for error, without bail. If taken on the *capias utlagatum*, he must give bail. (2 *Sellon's Pr.* 411.) Here, the defendants come in before the return of the *exigent* and *proclamation*, at common law.

S. Jones, jun., contra. This motion is not made on the ground of any irregularity in the proceedings; but for some alleged error, or merits in the case. It is a proceeding under the statute regulating outlawries. It may be objected, as to the form of this application, that no warrant of attorney, or authority to appear for the defendants, has been shown; nor is the affidavit which has been read, made by the parties themselves.

The object of proceeding to outlawry is either to obtain payment of the debt, or security, so that, in any stage of the proceedings, the defendant, by putting in bail, or giving security, may have them reversed. The eighth section of the act is general: it declares, "that before any reversal of any outlawry be had, and before any allowance of any writ of error upon any outlawry, the defendant, in the original action, shall put in bail, if bail be required in such action, not only to appear and answer to the plaintiff in the former suit, in a new action, &c., but, also, to satisfy the condemnation," &c. The question, then, is whether these defendants were liable to process of outlawry? They had once been citizens of this state, and subject to its laws. By removing into another state, they do not cease to be citizens of this state; they are still within its allegiance. The statute contemplates the residence of the party out of the state.

In *Matthews v. Ebro*, (1 Lord Raym. 349. S. C. Carth. 459.) a motion was made to set aside an execution upon outlawry, on affidavit, that the defendant was a foreign merchant, *and never in *England*; and that, never having been *infra legem*, he could not be *outlawed*. But the court decided, that the outlawry could not be vacated on motion and affidavit, but that the defendant might bring a writ of error, and put in bail under the statute of 4 and 5 W. & M. c. 18. (3 *Bac. Abr.* 253. tit. *Outlawry*, G.) Every citizen of this state who removes out of it, is liable to this process, and he can only get rid of it by putting in bail. Every citizen of the *United States* is entitled to the protection of the laws of this state.

Sedgwick, in reply. In *Serecold v. Hamson*, (2 *Str.* 1178.) where a writ of error was brought to reverse an outlawry, be-
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cause the defendant was beyond sea, the court had no difficulty in reversing it; and the only question was as to the terms on which it should be done, whether on filing common or special bail. The court were of opinion, that under the statute of 4 and 5 *W. & M. c. 18. s. 3.*, which says, that "it shall be reversed without bail in all cases; but where special bail shall be ordered by the court, they had a discretionary power to require bail or not;" and though the 13 *Elizabeth. ch. 3. s. 3.* (which is the same as the 8th section of our act), is the only act which expressly required bail, it was not to be inferred from thence, that in other cases, it was not to be insisted on.

Tidd, after mentioning the cases cited by the counsel of the plaintiffs, says, "it seems, however, to be discretionary in the court to relieve by motion, or put the parties to a writ of error; and of late years, they have gone further than heretofore, on motion, the more effectually to expedite justice, save expense, and preserve the credit and character of the defendant."

Per Curiam. The motion, in this case, is not grounded on any irregularity in the proceedings; and we shall not, therefore, relieve, except on terms. The defendant, if he wishes to reverse the proceedings, on the facts stated, must resort to a writ of error. But, without giving any opinion on the case as stated in the affidavits, we must deny the motion, unless the defendant puts in good special bail, on a writ to be issued in a new action.

Rule accordingly.

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PERCIVAL against HICKEY.

THIS was an action of *trespass*, for running down the vessel of the defendant at sea, tried before Mr. Justice *Yates* at the *New-York Sittings*, in *April*, 1819. The testimony of the witnesses given at the trial was contradictory. The following are the material facts in the case:

The defendant was commander of the *British* sloop of war *Atalanta*, cruising in company with the *Cleopatra*, captain *Pechell*, his senior officer. On the 2d of *May*, 1810, in latitude about 32 degrees north, and longitude 33 degrees west, about noon, a signal was given for the chase of a vessel to the windward, (the schooner *Mary*, commanded by the plaintiff.) The chase was continued until about 8 o'clock in the evening, the wind increasing and blowing hard, and the *Atalanta* firing guns at intervals, to bring the chase to, but which were disregarded. A little past 8 o'clock, (as *T. O. Sumner*, a seaman on board the *Atalanta*, and a witness for the plaintiff, testified) the man on the fore-castle of the *Atalanta* called out, that the schooner was under the lee bow with a light out.

Where an act not wilful, but the result of negligence, is the immediate and direct cause of an injury, an action of *trespass vi et armis* will lie. (a)

Where a bel-ligerent cruiser chases a neutral vessel, supposing her to be an enemy, or for the purpose of search, and in coming up with her, through negligence, runs foul of the neutral vessel

(a) Vide *Guilla v. Swan*, 19 Johns. Rep. 381.

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which had hove to in the night, by which she was sunk and lost, an action of trespass lies, at common law, at the suit of the neutral, against the commander of the ship of war, for the damages sustained; it being considered as a *marine tort* merely, of which a court of common law has concurrent jurisdiction with the instance court of admiralty. (b).

Under the last or general interrogatory, a witness examined under a commission may, in his answer, state facts not drawn forth by the previous particular interrogatories.

Where a vessel has been captured and condemned, though the owner recovers the amount of the freight from the insurers, the seamen have not, therefore, a right to receive their wages. So, where a neutral vessel was run foul of by a bel-

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ligerent cruiser, and was sunk and lost, the seamen are not entitled to their wages, though the neutral owner re-

The *Atalanta* began to shorten sail, but before it could be done, she passed the *Mary*, firing some muskets and a gun as she passed. The defendant ordered the *Atalanta* to tack; *but she wore round, and as soon as she wore, the man on the forecastle called out "hard a starboard, if not, we go into the schooner." The defendant, who was standing on the poop, ordered silence, and directed the helm to be put *a port*, but before this could be done, the *Atalanta* struck the *Mary*. The *Atalanta* backed her sails to get clear, and the *Mary* fell to leeward, and soon after disappeared, and was supposed to have gone down. The plaintiff and his crew came on board the *Atalanta*, with nothing but the clothes which they had on at the time. The *Atalanta* struck the *Mary* between the fore and main mast, and was herself much injured. The plaintiff's witnesses were of opinion, that if the helm of the *Atalanta* had been put *a starboard*, when the man at the forecastle called out, she would not have struck the *Mary*. The witnesses for the defendant deposed, that the night was very dark, the wind blowing hard and a heavy sea running; and that the accident was owing to the darkness of the night; that the helm of the *Atalanta* was ordered to be put up and the sails to be thrown back, but before this could be done, the vessels struck each other; that the collision was wholly unintentional; that the chase was supposed to be a French vessel, and was under a heavy press of sail, endeavoring to escape. The plaintiff's witnesses, the chief mate and T. O. Sumner, stated, that the *Mary* was lying to when the *Atalanta* first passed her, and that during the chase, she had American colors flying at the topgallant-mast head.

The plaintiff offered in evidence the answers of N. Parker and T. Dodd, to the last interrogatory annexed to a commission under which they were examined in, which answers they deposed as to the ownership of the vessel, and the nature and value of the cargo with which the *Mary* sailed from Boston, in November, 1809, previous to her loss as above stated, which evidence was objected to by the defendant's counsel; but the objection was overruled by the judge. It appeared from this evidence, that the *Mary* sailed from Boston in November, 1809, with a cargo of various articles, stated to be invoiced at above 15,000 dollars; that she proceeded to Fayal, and thence to Teneriffe, but without disposing of any of her cargo; that she then went to Bonavista,* one of the Cape de Verd islands, where she traded, and after going to St. Jago, and other places, returned again to Bonavista, from which place she sailed, having on board a cargo of the value of 15,000 dollars, including 2,000 dollars in specie. The vessel was valued at 8,000 dollars. E. Howard, the mate of the *Mary*, was offered as a witness to prove the ownership of the *Mary*, and the nature and value of her cargo at the time she was run foul of by the *Atalanta*. His evidence was objected to; but the objection was overruled by

(b) Johnson v. Dalton, 1 Cowen's Rep. 543.

the judge. After he had given his evidence, the counsel for the defendant again objected to the witness, on the ground of interest disclosed during his examination, which rendered him incompetent; he having stated that besides his *wages*, which remained unpaid, he had an adventure on board the *Mary*, at the time she was run down, which was worth about one thousand dollars, and which was lost by that accident; but the objection was overruled.

The defendant's counsel then moved for a nonsuit, on the ground, that the evidence as to the ownership of the vessel, and the value of the vessel and cargo, was incompetent, and too uncertain to go to the jury; and, secondly, because the court had no jurisdiction of the cause; but the judge overruled the motion, and the defendant's counsel excepted to his opinion.

The defendant's counsel then offered to prove that the loss of the *Mary* was not the result either of design or negligence on the part of the defendant, but was owing either to inevitable accident, or to the negligence or mismanagement of the plaintiff. The counsel for the plaintiff objected to this evidence, as inadmissible under the plea of not guilty, but the objection was overruled by the judge; and the depositions of the purser and two of the crew of the *Atalanta*, and of Captain *Pechell*, of the *Cleopatra*, taken under a commission, were read. Several experienced ship masters were also examined as witnesses, and stated their opinions as to the conduct and management of the *Atalanta*, under the circumstances stated by the other witnesses.

The defendant's counsel offered to show that proceedings had been instituted by the plaintiff against the defendant, in the High Court of Admiralty in *England*, to recover damages *for the injury complained of, and produced and offered to read an exemplified copy of the *monition*, issued at the suit of the plaintiff against the defendant, to proceed to adjudication in the case of the *Mary*, dated the 10th of *November*, 1810. The plaintiff's counsel objected to this evidence, and the objection was sustained by the judge. The counsel for the defendant then offered in evidence, exemplified copies of depositions, with exhibits annexed, taken in the Admiralty Court, in the same case, but which did not contain the examinations of the mate and other witnesses on the part of the libellant in that case. The plaintiff's counsel objected to this evidence, and it was overruled by the judge, to whose opinion the defendant's counsel excepted.

*The defendant's counsel again moved for a nonsuit, on the grounds before stated, and, also, because, that if any action could be maintained, it should be an action on *the case*, and not trespass; but the motion was again overruled by the judge.

The cause was then summed up by the counsel on both sides, and the judge charged the jury, that if they should believe, that the disaster was the result either of design or negli-

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covered the full value of the vessel and cargo in an action of trespass against the commander of the belligerent ship.

Exemplifications of the proceedings in another court, between the same parties, for the same cause of action, are not admissible in evidence under the general issue; but the pendency of another suit, in another court, for the same matter, should be pleaded in abatement.

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gence in the defendant, they ought to find a verdict for the plaintiff; or if they believed it to have been intentional on the part of the defendant, supposing the *Mary* to be a *French* vessel, the plaintiff would be entitled to a verdict; but if the jury believed the accident to have been involuntary and unavoidable, they ought to find a verdict for the defendant. That exemplary damages ought to be allowed, in case the defendant did the act intentionally, not supposing the *Mary* to be a *French* privateer; but if he did suppose her to be such, and did the act intentionally, or if it was attributable to negligence in the defendant, the jury might, in either case, allow interest upon the value of the vessel and cargo from the time of the loss, not as *interest*, but as damages. The judge, also, suggested to the jury, that if they should find for the plaintiff, they might state, as part of their verdict, whether the *Mary* was run down through design, or through negligence or mismanagement of the defendant; and if they should be of opinion, that it was done through design, whether the defendant did it, supposing the *Mary* to be an enemy, or *French* vessel, or believing her to be a neutral.

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The jury found a verdict for the plaintiff for 29,734 dollars and 94 cents damages, and declared as a part of their verdict, that the disaster was the result of gross negligence in the defendant.

A motion was made to set aside the verdict, and for a new trial.

D. B. Ogden, for the defendant. 1. The action should have been *case*, not trespass. The jury have found, that the injury to the plaintiff was caused by the *negligence* of the defendant. Though there may be a diversity of opinion among the *English* judges, as to what is the proper criterion of distinction between trespass, and trespass on the case; yet nothing will be found in the cases decided in *England*, or in our own courts, to show, that *case* is not the proper form of action for an injury of this kind. In *Ogle v. Barnes*, (8 Term Rep. 188.) *Lawrence*, J., says; the injury "may be occasioned by the wilful act, or by the negligence of the defendant; it is a question of evidence; if the former, trespass is the proper action; if the latter, trespass on the case." That was an action for so negligently steering the vessel of the defendant, as to run foul of the plaintiff's vessel, and *case* was held to be the proper action. In *Scott v. Shepherd*, (3 Wils. Rep. 403. 408.) *Nares*, J., says, "If the act, in the first instance, be unlawful, trespass will lie; but if the act is *prima facie* lawful, and the prejudice to another is not *immediate*, but *consequential*, it must be an action on the case." *Blackstone*, J., places it on the distinction between the injury being *immediate* or *consequential*. The jury, in this case, have found merely a negligence, or omission to do some act; not the commission of an act directly injurious. Admitting

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that the plaintiff might elude the belligerent right of search; yet if, by his efforts for that purpose, he prolonged the chase until dark, the consequence rests with him, not with the defendant. In *Day v. Edwards*, (5 Term Rep. 648.) Lord Kenyon said, the distinction between the actions of trespass, and trespass on the case, was perfectly clear. "That if the *injury be committed by the *immediate act* complained of, the action must be trespass; if the injury be merely consequential upon the act, that action upon the case is the proper remedy." In that case, the defendant furiously drove his cart against the plaintiff's carriage. In *Savignac v. Roome*, (6 Term Rep. 125.) the declaration was, that the defendant's servant *wilfully* drove against the plaintiff's carriage; the injury was immediate, and trespass was held to be the proper action. In *MMannus v. Cricket*, (1 East Rep. 106.) Lord Kenyon held, that for the wilful act of a servant, without the command of his master, trespass would not lie against the master, and so far the case of *Savignac v. Roome* was overruled. (*Morely v. Gaisford*, 2 Hen. Bl. 442.) In the case of *Ogle v. Barnes*, (8 Term Rep. 183.) the action was for carelessly and *negligently* steering the vessel of the defendant, so that it run foul of the plaintiff's vessel, with great force; and it was objected, that trespass should have been brought, but the court held, that an *action on the case* was the proper remedy. That case is precisely like this, for the jury have found, that the injury was caused by the *negligence* of the defendant. (*Tripe v. Potter*, cited by *Grose*, J.) In *Leame v. Bray*, (3 East Rep. 593.) the defendant himself drove the carriage, and on the wrong side of the road, and if he had driven on the right side, the accident would not have happened; he was doing an unlawful act, and trespass was held to lie. In the present case, the defendant was not at the helm, and was in the exercise of his lawful right. The case of *Leame v. Bray* has been much doubted, (*Rogers v. Imbleton*. *Hugget v. Montgomery*, 5 Bos. & Pull. 117. 446.) but in *Lotan v. Cross*, (2 Campb. N. P. Rep. 464.) Lord Ellenborough recognizes the case of *Leame v. Bray*. In *Covell v. Laming*, (1 Campb. N. P. Rep. 495.) the defendant was himself at the helm. The case of *Nicholson v. Mounsey and Symes*, (15 East Rep. 384.) was an action on the case, and the captain of the sloop of war was held not to be answerable for running down the plaintiff's vessel, not being on deck, and the vessel being, at the time, under the immediate direction of his lieutenant.

*If the criterion between *trespass* and *case* be, as some of the *English* judges have supposed, whether the act was lawful or unlawful, this action should be *case*, for the defendant, at the time, was in the exercise of a lawful right. If the criterion be, whether the act was *wilful* or not, the action ought to have been *case*, for the jury have negatived that the act was *wilful*. If the criterion be, the injury proceeding directly and immedi-

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ately from the act of the defendant, then the action should have been *case*, and not trespass; for there was no act done by the defendant; and if, from the evidence, it appears, that putting the helm one way or the other, was the cause of the injury, the defendant was not at the helm; as regards him, therefore, the injury was not direct. The defendant gave an order to the helmsman to put the helm *a port*; but as that was not done, the vessels did not come in contact in consequence of that order. The injury, therefore, was not from the order of the defendant, and he cannot be liable in *trespass vi et armis*; he could only be so, if he had ordered the helm *a port*, with *intent* to run down the plaintiff's vessel, and that order had been obeyed; but the jury have negatived any such intention. We are aware, that it has been decided, that if the injury arise from the *negligence* of the defendant, though it be immediate, the party injured has his election to treat the *negligence* of the defendant as the cause of action, and bring *case*, or to consider the act itself as the injury, and bring trespass. (*Blinn v. Campbell*, 14 *Johns. Rep.* 432. 1 *Chitty Pl.* 127.) This doctrine, that both actions will lie, where there is an immediate, and also a *consequential* injury, is stated by *Wedderburne*, *arguendo*, in the case of *Harker v. Birkbeck*, (3 *Burr. Rep.* 1561.) and that appears to be the origin of it as laid down in *Blinn v. Campbell*, which was an action for negligently firing a pistol, and wounding the plaintiff in the leg. No doubt, that where a *trespass* has been committed, a party may, in many cases, waive the *trespass*, and bring an action on the *case*; but he can have no right of election, where no *trespass* is committed. It is the act done which must control and give form to the action, and not the action to the act. No form of action can make that a *trespass* which was not so before; *and we contend, that the defendant did not commit a *trespass*.

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2. Improper evidence was admitted. Under the general interrogatory, the witness cannot answer as to any new matter not inquired about in the particular interrogatories. If such a practice were allowed, it would destroy the use of interrogatories altogether, and be a surprise on the other party. But, if admissible, the evidence was too loose and vague to be allowed to go to a jury.

Again; the testimony of *Howard*, the mate, was inadmissible. He had not received his wages, and if the plaintiff should recover the value of the cargo, the witness would be entitled to wages.

3. The evidence on the part of the defendant was admissible under the plea of *not guilty*. (*Le Caux v. Eden*, *Doug.* 594.)

4. The verdict was against evidence. It was founded on negligence only; and if, from the evidence, it should appear, that no negligence was attributable to the defendant, the verdict ought to be set aside. A judgment must be formed from facts

which took place on board of the *Atalanta*, not from what appeared on board of the *Mary*. For it is only on board of the former vessel, that the witnesses could know any facts as to the negligence of the defendant. In this view, the whole evidence of the mate of the *Mary* ought to be rejected. (Here the counsel examined and discussed the evidence in the case.)

5. This court has no jurisdiction of the cause. It belongs to the *Admiralty* Court. It is an action against a belligerent cruiser, for improper conduct, in the exercise of his right to capture enemy's property, or to make search on board of a neutral vessel, for enemy's property, under the law of nations. The right of search grows entirely out of the law of nations. This court cannot decide on the rights of war. It is not competent to apply the law of nations to the case. A belligerent has a right to search, and if the neutral resists, he may be captured and condemned as prize of war. How can this court say that the attempt of the plaintiff to elude the right of search, and his conduct during the chase, did not render him liable to capture and condemnation as prize? It appears from the case, that the plaintiff himself considered *that his case was cognizable only in the Admiralty. He went to *England*, for the purpose of prosecuting the defendant, and commenced a suit against him: in the High Court of Admiralty, and the mate says, that he was examined in that court, as a witness in the cause. Surely, the plaintiff would not, as matter of choice, have applied to that court; he must have been advised, that a court of common law had no jurisdiction of his case. There are many cases of *marine trespass* to be met with in the books; but not a case can be found of an action at common law, against the commander of a belligerent vessel, for a *trespass*, in exercising the right of search. (*Le Caux v. Eden, per Buller, J., Doug.* 601.) Courts of Admiralty have jurisdiction of *marine trespasses*, and of all questions incident to prize. If a belligerent boards a vessel on the high seas, and finding she is a neutral, proceeds to plunder her, it is a case of admiralty jurisdiction. (*The Amiable Nancy, 3 Wheat. Rep.* 546.) In *Navion v. Hallett*, (16 *Johns. Rep.* 327. *in Error*.) Chancellor *Kent* lays it down as an established principle, that a court of admiralty has exclusive jurisdiction, not only of all matters of prize, but of all incidental questions growing out of the question of prize. Are not the transactions which take place in attempting to make prize, as much incidental to the question of prize or no prize, as those which take place after a capture? Must not the conduct of the belligerent commander, in the one case as well as in the other, be judged of by the law of nations? Suppose, that in bringing a neutral to, for the purpose of search, the belligerent cruiser fires a gun into her, which does an injury, is that not a case of admiralty jurisdiction? In the case of *Faith v. Pearson*, (6 *Taunt.* 439.) a *British* cruiser boarded an *English* vessel, supposing her to be an

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American, and after detaining her until he was satisfied that she was not an *American*, he dismissed her. In an action of trespass brought against the commander of the ship of war, *Gibbs*, chief justice, nonsuited the plaintiff, saying, that according to *Le Caux v. Eden*, no action could be maintained for taking a vessel, where the captors were acting under a belief that she was a subject of prize; and the Court of *C. B.* refused to set aside the nonsuit. The true reason is given by Chief Justice *Lee*, in *Key & Hubbard v. Pearse*, (*Doug.* 606.) that prizes are acquisitions *jure belli*, and *jus belli* is to be determined by the law of nations, not by the municipal law of a particular country.

T. A. Emmet, and *H. Sedgwick*, contra. 1. As to the form of the action. This question has been very fully examined in the case of *Scott v. Shepherd*. (2 *Wm. Bl.* 392. 3 *Wils.* 403.) *Gould, J.*, said the line was very nice between case and trespass; and he thought there were many cases where both or either would lie. In *Starr v. Jackson*, (11 *Mass. Rep.* 521.) *Ch. J. Parker* observed, that "originally, it would certainly have been immaterial whether the damages should be settled by an action of trespass, or an action on the case: the wrong being direct and immediate to the property damaged, both actions being founded in *tort*, and the plea to each being the same, as is also the principle on which the damages would be ascertained." In *Slater v. Baker*, (2 *Wils.* 362.) the court said, "That the plaintiff ought to receive satisfaction, for the injury was admitted: and the court would not look with eagle's eyes to see whether the evidence applied exactly or not to the case; when they saw that the plaintiff had obtained a verdict for such damages as he deserved, they would establish such verdict, if possible." In *Leame v. Bray*. (3 *East's Rep.* 593.) *Laurence, J.*, said, that "it was more convenient that the action should be trespass than case; because if it be laid in trespass, no nice points can arise upon the evidence, by which the plaintiff may be turned round upon the form of action, as there may, in many cases, if case be brought; for there, if any of the witnesses should say, that in his belief the defendant did the injury wilfully, the plaintiff will run the risk of being nonsuited." In an action of trespass *vi et armis*, which is what is called a *formed action*, and the writ for which is found in the *Register*, the declaration would be good, without alleging that the act was done wilfully or negligently; and the precedent for the declaration in this case was found in *Thompson's Entries*, p. 251. If, then, the facts averred in the declaration are sufficient to maintain an action, and if all those facts are proved at the trial, surely the action cannot be defeated by the proof of other things *done by the defendant, which do not amount to a perfect justification, so as to take away *all* right of action. If the plaintiff proves all the facts alleged in his declaration, how can he be non-

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sulted? How can the defendant say that he was not guilty of those acts, because he can prove a *negligence*, perfectly consistent with them, and in itself injurious and unlawful? If *wilfulness* entitles the plaintiff to bring *trespass*, and *negligence* compels him to bring *case*, then *wilfulness* and *negligence* are the *gist* of the respective actions; and every action of trespass *vi et armis*, which does not aver that the act was *wilfully* done, would be bad on general demurrer, which is contrary to every day's experience. Besides, if *wilfulness* is the *gist* of the one action, and *negligence* of the other, what becomes of all those immediate and forcible injuries, which are not *intentional*, but *accidental*? What becomes of the *consequential* injuries, which are *wilful*? If *wilfulness* does not enter into the *gist* of the action of trespass *vi et armis*, and it consists in the *force* and *directness* of the injury, the proof or no proof of *wilfulness* can only affect the quantum of damages. *Chitty*, (1 *Chitty Pl.* 122.) lays down the rule, that "if the injury be *forcible*, and occasioned *immediately* by the act of the defendant, *trespass vi et armis* is the proper remedy; but if the injury be not, in legal contemplation, *forcible*, or not *direct* and *immediate* on the act done, but only *consequential*, then the remedy is by an *action on the case*." Here, then, is a broad and clear line of distinction, for the guide of the party and the pleader. It makes no difference that the injury was unintentional and the act lawful. (1 *Chitty Pl.* 128, 129. 27 *Hen. VII.* 28 a. *Hob.* 134. 1 *Str.* 593. 634. 3 *East. Rep.* 593. 600. 1 *Esp. N. P. Rep.* 55. 2 *Hen. & Mun.* 423. 14 *Johns. Rep.* 432.) It being, then, the undoubted and settled rule, from the *year-books* down to the present time, that where the injury is *immediate* and *forcible*, *trespass* is the proper action, whether that injury be accidental, negligent, or wilful, it is surprising that any diversity of opinion should exist on the subject, or that any difficulties should have arisen from the circumstance of a ship or carriage being in motion at the time of the injury. In *Leame v. Bray*, (3 *East*, 593. 601.) *Le Blanc, J.*, says, that "in actions for running down ships at sea, difficulties may occur; because the *force* which occasions the injury, is not immediate from the act of the person steering. The immediate agents of the force are the wind and waves, and the personal act of the party rather consists in putting the vessel in the way to be acted upon." From this it would seem, that *wilfulness* was evidence that the injury was the *immediate* act of the party, and that *negligence* might be evidence, that it did not arise from his immediate act, but from some operation of the wind and waves, in which he did not participate: Such appears to have been the case of *Ogle v. Barnes*, (8 *Term.* 188.) Lord *Ellenborough*, in *Leame v. Bray*, speaking of that case, says, "that it did not appear that it was the personal act of the defendants, or that they were on board of the ship at the time." But though negligence may, sometimes, concur to show that the injury did not result from the immediate act of the de-

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fendant, yet neither in fact or law, will it always do so, nor is it a safe criterion on this point. It is admitted that if the running foul be *wilful*, trespass is the only action. Why? Because the motion the defendant intended to give to the ship, whether given by his act or orders, shall be considered as given by him, through the instrumentality of the winds and waves, which science has enabled him to use as propelling powers. Suppose, then, the motion so designedly impressed on the ship, by the act or orders of the defendant, to be continued, and that his *negligence* consisted in not taking due precaution to prevent the plaintiff's vessel from sustaining injury by the motion, or force impressed on the ship, would not the injury sustained be as directly and immediately the result of the force and motion impressed on the ship, as in the case of design? Indeed, if the injury could not be considered as the immediate act of the defendant, because "the immediate agents are the wind and waves," it would be very difficult to support an action for a forcible personal injury, not inflicted by the personal strength of the defendant; as when a person fires a gun or pistol, and the gunpowder and spark are the immediate agents. The law would, also, be different as to vessels propelled by steam, or by wind and waves. The maxim is, **qui facit per alium, facit per se*, "He who orders an act, from which a forcible injury directly follows, is a trespasser." (1 Lord Raym. 39. Salk. 613. 3 Wils. 403.) In *Cole v. Fisher* (11 Mass. Rep. 137.) the defendant, by discharging a gun, frightened the plaintiff's horse, who ran away and broke the carriage of the plaintiff, and trespass was held to be the proper remedy. In *Corell v. Leaming*, (1 Campb. N. P. Rep. 497.) Lord Ellenborough said, that he could never understand the grounds of the difficulties which had been raised on the subject. That his opinion was always uniform, that the only just and intelligible criterion was, whether the injury complained of arose directly, or followed consequentially, from the act of the defendant. "If, in the dark," he observes, "I ignorantly ride against another man on horseback, this is undoubtedly a trespass, although I was not aware of his presence, until we came in contact. It makes no difference that here were parties sailing on ship board. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along, in the direction which he communicated. The force, therefore, proceeded from him, and the injury of which the plaintiff complained, was the immediate effect of that force." The law must be the same for ships and carriages. In the case of *Lame v. Bray*, where the accident arose from the darkness of the night, the defendant was no otherwise blameable than for driving on the wrong side of the road. If he had been on the right side of the road, and had driven his carriage against that of the plaintiff at rest, would not the action have been trespass? (*Day v. Edwards*, 5 Term Rep. 618. *Savignac v.* 210

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Roome, 6 Term Rep. 125. *M Manus v. Cricket*, 1 East Rep. 106.) The whole doctrine was fully discussed in *Leame v. Bray*, which has never been overruled, though Sir James Mansfield, in *Rogers v. Imbleton*, (5 Bos. & Pull. 117.) intimated some doubt as to it. (5 Bos. & Pull. 446.) The most that can be made of the decision of the C. P. is, that an action on the case will lie; and *Chitty* cites it in support of the position, that where the injury is attributable to negligence merely, the party has his election to bring case or trespass. Lord *Ellenborough*, in the case which *has been cited, alludes to the difference of opinion, and expresses his own opinion, in strong terms, and it has been acquiesced in. (*Lotan v. Cross*, 2 Camp. N. P. Rep. 464. 11 Mass. Rep. 59. 2 Lord Raym. 1032. 2 Maule & Selwyn, 77. 1 Johns. Rep. 511. 3 Johns. Rep. 466.)

2. As to the objection to the answers of *Parker & Dodd*; they were examined as to the value of the vessel and cargo, on the 10th interrogatory, and they were asked, under the 13th interrogatory, as to "what cargo was on board." There could be no surprise on the adverse party. The interrogatories were sufficient to apprise them of the nature and object of the evidence sought; but this objection comes too late, and ought not to be favored, especially as the defendant has not shown that he has, in fact, been surprised, or that there has been any mistake in the evidence.

As to the mate's evidence; he was not interested. By the loss of the freight, his wages were lost; though the plaintiff should recover damages for the loss of his property, it would give the seamen no right to an action for their wages.

3. Under the plea of *not guilty*, the defendant cannot give in evidence any matter of justification. That must be specially pleaded and put upon the record. (*Milman v. Dolwell, Knapp v. Salisbury*, 2 Campb. N. P. Rep. 378. 500.)

4. It is objected, that the verdict is against evidence. There was evidence on both sides, and the court will not send the cause to another jury, unless in a very strong and palpable case. The belligerent is bound to exercise his right of search, in such a manner, as not to injure the neutral. (2 Azuni Mar. L. 202.) (Here the counsel entered into an examination of the evidence detailed in the case.)

5. As to the jurisdiction of the court: a confusion is created by using the expression, "Court of Admiralty," in an equivocal sense. In *England*, the Court of Admiralty consists of two courts; the *instance* court, and the *prize* court: The former is governed by the civil law, the laws of *Oleron* and the customs of the admiralty, modified by statute; the latter decides according to the law of nations, and the course of the admiralty. (2 Bro. Civ. & Adm. L. 29. 34. 43. 123. *Godolph. Adm. Juris*. 40.) The *Instance* *Court of *England* does not decide according to the common law, or the law of nations, but according to its own peculiar code. It has cognizance of matters con-

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cerning shipping, the powers, rights and duties of persons employed in ships, and of the *toris* committed by or upon them, or damages done to ships. These matters are inquired into, and decided in the *instance* Court of Admiralty, not because they have any connection with the law of nations, but because they are injuries against persons or property, for which this court, like a court of common law, has provided remedies. Neither the *instance* Court of Admiralty, nor a common law court, institute actions founded on the law of nations; though both of them do not hesitate to discuss and decide on that law, when it incidentally comes before them, as matter of defence, or as limiting the rights and claims of the plaintiff. The cases which have arisen on policies of insurance, show that this court will examine into the law of nations. (1 *Johns. Cases*, 363. 1 *Caines's Rep.* 60.) So, in *Tabbs v. Bendelack*, (3 *Bos. & Pull.* 207. note,) the court decided an important question on the law of nations; that in regard to *neutrality*, a man is not considered as belonging to the country of his birth or adoption, but to the place of his *domicil* at the time. By the municipal law, a man is a citizen or subject of that country only, in which he was born or is naturalized. By the law of nations, he is deemed a citizen of the country in which he resides. So when this court decided the case of *Wheelwright v. Depeyster*, (1 *Johns. Rep.* 471.) they determined an important question of the law of nations; and the District Court of South Carolina, and the Supreme Court of the *United States*, when they decided the same question differently in *Rose v. Himely*, (4 *Cranch*, 241.) were acting not as *prize* courts, but as *instance* courts. So, in the case of *Griswold v. Waddington*, (15 *Johns. Rep.* 57. S. C. 16 *Johns. Rep.* 438.) this court and the Court of Errors decided according to the law of nations, that all contracts between enemies were void. Almost all the authorities cited were taken from the decisions of the *prize* courts. In *Bell v. Potts*, (8 *Term Rep.* 548.) the Court of K. B. directed the cause to be argued by *civilians*, because it was a question of the law of nations. When *this court, in *Goodrich v. Gordon*, decided, that a *ransom bill* was a valid contract, their decision was founded on the law of nations. So, in *Saloucci v. Johnson*, (*Park on Ins.* 498.) the Court of K. B. decided, that a neutral, by the law of nations, was not bound to submit to the right of search. Indeed, the books are full of cases, in which the courts of common law examine and decide on questions incidentally arising on international law, as well as the laws of foreign countries, though they will not entertain an action founded on those laws, except in the case of a *ransom*, which, in truth, is an anomaly. It is not, therefore, correct to say, that whenever the court perceives, that the case must be decided by the law of nations, it ceases to have jurisdiction.

It may be supposed, that, as the defendant was an officer commanding a national ship, acting under a public commission,
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the matter may partake of a national concern, and the suit ought, therefore, to have been brought in a court of the *United States*, either of admiralty or common law jurisdiction; but if it had been brought in such a court, it would still have been tried by the same law as in this court. But there is nothing in the supposition, that a state court has not equal cognizance of the case. It is a *personal tort*, not a national question. It is the defendant himself who must answer for his conduct, not his government. *Vattel* (*Liv. 2. ch. 6. s. 73, 74.*) says, that such acts of individuals are not to be imputed to the nation, unless it approves of, or ratifies them. If the offender is within the power of the state offended, he may be laid hold of, and compelled to do justice. (*Id. s. 75.*) If this be the doctrine in *criminal cases*, *a fortiori*, it must be so, in regard to civil injuries.

Again; this objection, as to the jurisdiction of the court, comes too late. Independent of the question of prize or not, any question arising which involves the law of nations, and which is to be matter of defence, or an exception to the jurisdiction, ought to be specially pleaded. It is too late, after a plea in bar, to object to the jurisdiction of the court. (*Smith v. Elder, 3 Johns. Rep. 105. Cowp. 72. Doug. 611.*) Taking goods as prize, is, *prima facie*, exercising a lawful right. This is not the case of the lawful *exercise of the right of search; but is, *prima facie*, a *tort*, for running down the plaintiff's vessel on the high seas, and any matter of justification should be specially pleaded. It will not be denied that this court has jurisdiction of a *marine trespass*. (*Hallet v. Novion, 14 Johns. Rep. 273.*) In *Le Caux v. Eden*, (*Doug. Rep. 614. note.*) Lord Mansfield says, "a thing being done on the high seas does not exclude the jurisdiction of the courts of common law. For seizing, stopping, or taking a ship, upon the high seas, not as prize, an action will lie; but for taking *as prize*, no action will lie. The nature of the question excludes not the locality." To take away the jurisdiction of the common law court, it must be either a question of *prize*, or such a taking or act as gives the one party a right to compel the other to treat it as prize. Whatever excludes the jurisdiction of a court of common law, excludes, also, that of the *instance Court of Admiralty*. This shows the importance of keeping in view the marked distinction, as to jurisdiction, between the *instance court* and *prize court*. Again; if this is a case which can be tried only in a *prize court*, it can be tried only in the court of the *captor*. Though this doctrine has been much disputed, it is now finally settled by the Supreme Court of the *United States*, in the case of the *Invincible*. (*1 Wheat. Rep. 233.*) Then, what is the extent of the surrender of jurisdiction demanded of the plaintiff? If he cannot obtain justice here, he can look for it no where, but in a *British prize court*. If the sovereign of the captor has a right to

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consult his own dignity in requiring all questions of war to be decided in his own courts of admiralty, the courts of this country have duties to perform, and are bound to protect their own citizens. Then what can a *British prize court* try? It derives all its authority from its *commission*, by which it is authorized "to proceed upon all, and all manner of captures, seizures, prizes, and reprisals of all ships or goods that are, or shall be taken;" and the *commission*, in setting forth the judge's authority, adds what may be called his consequential jurisdiction; "and, also, to hear and determine all, and all manner of causes and complaints, as to ships and goods, seized and taken as prize, specially constituted and appointed." * (*Doug. 614. 2 Brown's Civil and Adm. Law, 209, 210.*) Whatever does not come within the words of this commission, is not cognizable in a prize court. But, it is said, this was a *capture*, and that the plaintiff attempted to elude the right of search. To constitute a capture, there must be a *taking of possession*. The plaintiff had ceased all effort to escape; his vessel was lying to, ready to submit to the search of the defendant. It must be the exercise of the hostile right of capture, to give jurisdiction to a *prize court*. Suppose that no accident had happened, and the defendant, after exercising his right of search, had dismissed the plaintiff's vessel, would this be a capture, or an acquisition of property, *jure belli*? Suppose, that during the search, the defendant had struck the plaintiff: must the plaintiff have sought his remedy for this personal injury in a *prize court*? True, if the plaintiff's vessel had been carried in as prize, or for adjudication, perhaps, in that case, the personal *tort*, as incident to the capture, might be tried in that court. Prize or no prize, says Lord *Mansfield*, is the boundary line. (*Doug. Rep. 615.*) For prizes are *acquisitions jure belli*. The right of search is not a *jus belli*. *Grotius* no where treats of the right of search as among the *jura belli*. The *jura belli* are laws regulating, controlling, and systematising the carrying on of hostilities between *enemies*. They exist only between parties at war with each other. The right of search exists between a belligerent and a neutral, or parties not hostile to each other, and is founded on treaties, on the customary and conventional law of nations, for the preservation of peace and amity. In *Le Caux v. Eden*, it was doubted by respectable lawyers, whether courts of admiralty had exclusive jurisdiction as to questions incident to a capture. But, now, that question is, perhaps, too well settled to be again controverted. It is true, that prize courts have given damages, in certain cases, for personal *torts*, but these were cases of injuries arising during, or after the capture. And, in all cases, we believe, those who have commissions give security for their good behavior. Where there is no *capture*, the only remedy for the injury, in an admiralty court, is in the *instance court*. The case of the *Amiable Nancy*, (3 *Wheat. Rep. 546.*) has

been cited. That was *clearly a case of *instance* jurisdiction. In the district courts of the *United States*, the *prize* and *instance* jurisdiction are blended together. There is no form by which to distinguish them. They are only known by the subject matter. The proceedings in the case cited, were those of an instance court. There were no examinations in *præparatorio*. Roux filed his libel as an original suit, and brought in his adversaries to answer.

Again: it is argued that the plaintiff sued for redress in the *British Court* of Admiralty; but it was in the *instance* court, and that court entertaining the suit, shows that it was not a *prize* question. If he had gone to the *prize* court, he would have been told, "we have no jurisdiction; for here is no capture, seizure, or prize. So far from being the only court that can afford you redress, it is, perhaps, the only court in the world that cannot take cognizance of your case. Foreign courts of admiralty have their *prize* and *instance* courts blended together, as in your own country. Here the jurisdiction of the *prize* court is special and distinct." (*Vide Mostyn v. Fabrigas*, *Cowp.* 161. *Greenwood v. Curtiss*, 6 *Mass. Rep.* 358. 2 *Wheat. Rep. Appendix*, No. 1. 1 *Madd. Rep.* 15. 1 *Rob.* 237. 4 *Rob.* 408. 3 *Dallas*, 6. 159. 2 *Cranch*, 170.)

Wells, in reply. Originally, actions of trespass were laid *vi et armis et contra pacem*, for an individual wrong, involving not only the private injury, but the public peace; and besides the damages, a fine to the king was imposed, and the defendant was imprisoned until both were paid. These actions were among the *brevia formata* found in the *Register*. Afterwards, under the authority of the statute of *West.* 2. actions of *trespass on the case* were introduced. These new writs in case were laid *vi et armis et contra pacem*, or not, according to the circumstances of the particular case. The true criterion was, whether there was a *breach of the peace*, or not; and not whether the injury was *direct* or *consequential*. This distinction is of later date, and is first mentioned in *Fitzherbert*, *Nat. Brev.* So that, according to the old rule, neither *trespass*, nor *trespass on the case*, *vi et armis et contra pacem*, could be brought in a case, like the present, for *an injury committed on the high seas, because it could not involve a *breach of the peace of the realm*. This, of itself, shows, that the common law courts could not, originally, have jurisdiction of marine trespasses. They belonged exclusively to the admiralty, whose jurisdiction has been since usurped. It is "difficult to sustain upon principle, although not upon authority," says Judge *Story*, "that trespass will lie, at common law, for a marine tort on the high seas." (*Maisonnaire v. Keating*, 2 *Gall.* 342.) It is too late, however, now to draw this usurpation into question. Time has sanctioned it. But if the act, charged to be a trespass, is a seizure, or stopping as prize, the admiralty

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still retains its original exclusive jurisdiction. That this is the real character of the alleged trespass in this case, will hereafter be shown; but, for the present, supposing a cause of action to exist at common law, it is contended, that an action on the case, not trespass, would lie.

Trespass cannot be maintained, unless the act complained of was *wilful*, or the injury was caused by direct force, produced by the agency of the party complained of. Now, on neither principle can the present suit be maintained. It was avowedly brought on the ground of being a *wilful act*, and evidence was introduced on the trial for the purpose of proving it to be so; but the jury have negatived its being *wilful*, and have ascribed the injury entirely to negligence, for which, case is the proper remedy.

In *Beckworth v. Shoredike* and others, (4 Burr. Rep. 2092.) it was left to the jury to say, whether the trespass was *intentional*, or only a mere *involuntary accident*; and the Court of K. B. recognized the distinction between a mere accidental, involuntary trespass, and one *wilful* or voluntary; and said, that the former was not a cause of action, though Lord Ellenborough is made to say, in *Leame v. Bray*, that he did not find the distinction laid down in any of the cases, that in order to maintain trespass, the act must be *wilful*. In *Savignac v. Roome*, (6 Term Rep. 128.) the action was *case*, for *wilfully* (by the defendant's servant) driving against the plaintiff's carriage, and the judgment was arrested, because, the act being *wilful*, the plaintiff should have brought *trespass vi et armis*. So, in *Tripe v. Potter*, *cited in that case, which was an action on the case, for *wilfully* rowing a boat against the plaintiff's, he was nonsuited for the same reason. In *Ogle v. Barnes*, (8 Term Rep. 188.) the action was *case*, for running foul of the plaintiff's vessel, and a motion in arrest was made, because, it should have been *trespass*; but the motion was denied, as the charge was, that the injury was caused by the *negligence* of the defendant. All the judges said, that if the running foul had been *wilful*, trespass would be the proper remedy. The case of *Nicholson v. Mouncey*, (15 East, 384.) was, in all respects, like the present, except as to the question of prize; yet that was an action on the case. In *Leame v. Bray*, (3 East, 593.) the principle that *wilfulness* was essential to maintain trespass, seems first to have been departed from; for in *Shepherd v. Scott*, the act was *unlawful* in itself, and was, besides, in its origin, *wilful*. In *Leame v. Bray*, too, both the court and the counsel distinguish it from the case of a *collision of vessels*, where, it seems to be admitted, the remedy should be *case*. It is conceded, also, in that case, that the only instance to be found in the books, where it was held that an action of trespass for running down a vessel would lie, was that of *Tripe v. Potter*, in which the act was alleged to be *wilful*. *Huggel v. Montgomery* was an action

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of trespass *vi et armis* ; and the orders were given by the *pilot* who had charge of the defendant's vessel. *Rogers v. Imbleton* was an action on the case, and there was a demurrer, for that it should have been trespass ; but the demurrer was overruled. In these two cases, the court doubted the authority of *Leame v. Bray*. In *Webb v. Drake*, referred to in 15 *East*, 384, and in *Bowcher v. Novidstrom*, (1 *Taunt.* 563.) the action was *case*, for running foul of the plaintiff's vessel ; yet the injury was the consequence of the order given by the captain. In the latter case, the action, it is true, was *trespass*, but the act complained of was *wilful*, in cutting away the mainsail of the plaintiff's vessel. *Fetteplace and others v. Braddick and others*, (5 *Bos. & Pull.* 182.) and *Bennett v. Morta*, (1 *Holt's N. P. Rep.* 359.) were *actions on the case*, for running foul of the plaintiff's vessel. Thus, it appears, that the intention or wilfulness of the act was, at one time, at least, the *criterion by which to determine, whether it was trespass or not ; and it is to be regretted that it has been departed from, because it is the most natural and simple.

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Again ; in order to maintain trespass, it is necessary, according to the cases, in which that of *Leame v. Bay* takes the lead, that the act of the party complained of must be with *force*, and the *immediate* cause of the injury. The defendant, however, in the present case did no act whatever. He merely ordered the helm *a port*, but before the order was executed, the accident happened ; so that it was not occasioned by any act or order of the defendant. If the defendant, then, is to be held liable, in this form of action, it is not for any act done by him ; but, according to the finding of the jury, for the omission of duty on the part of his officers, or for *negligence* and want of due care, which are of the very essence of an action on the case.

2. It was, also, a ground of defence, that the loss of the *Mary* was an *inevitable accident*, and, therefore, trespass would not lie. The evidence went to the very charge, and was admissible under the general issue. In answer to what is said by Lord *Ellenborough* in *Covell v. Leaming*, we may appeal to the opinion of Lord *Mansfield*, in *Beckwith v. Shoredike*, that an involuntary trespass is not a cause of action, and to the good sense of the rules of pleading. The evidence, at all events, was admissible to show the character of the transaction, and that it was a taking *as prize* ; for trespass, at common law, will not lie in such a case. "Upon the general plea of not guilty," says Mr. *J. Buller*, "no action can be maintained where the question relates to prize." (*Le Caux v. Eden*, *Doug. Rep.* 594, and the cases cited in the note, especially *Livingston & Welch v. McKenzie*. *Faith v. Pearson*, 6 *Taunt. Rep.* 439.)

3. The verdict was against evidence. Here the counsel examined the evidence very minutely, and urged, that the principal witness of the plaintiff was contradicted in some of the

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material parts of his evidence; but that all the witnesses agreed, that the collision took place soon after the *Atalanta* wore. The *Atalanta*, standing on her larboard tack, passed the *Mary*, who was to windward, standing on the same tack. Shortly after, the *Atalanta* attempted to *tack in order to fetch the *Mary*, but being unable to do so, she wore and fell to leeward. Now, if the *Mary* had continued the tack she was on when the *Atalanta* passed her, the accident could not have happened. The defendant did not even know, that the *Mary* had hove to, and he must have supposed her, when his own ship wore, still standing on the tack, on which she was when he passed her. The *Mary* saw the *Atalanta*, and should have taken care to avoid her. The fault was on her side, for she had the wind. If she was lying to when the *Atalanta* passed her, why did she not continue in the same position? Why did she change her tack, which alone was the cause of the collision? The result of the evidence is, that the defendant might have hove to while there was day light; that both vessels wore, without either knowing that the other had done so. The difference of position, which was the necessary consequence, the darkness of the night, and both vessels putting their helms up at the same time, sufficiently account for the accident, without imputing any fault or negligence to the defendant. It is clearly a case of *accidental collision*, or a casual misfortune, arising from mutual mistake, which has produced a mutual loss, for which neither party ought to be made responsible to the other.

4. As to the jurisdiction of the court: It is not pretended on the part of the defendant, that the *instance* Court of Admiralty had cognizance of the case, and the proceedings by the plaintiff in the Court of Admiralty, which were offered in evidence, and rejected by the judge, show, that it was the *prize*, and not the *instance* side of the court in which they were instituted. Indeed the *prize* court only could entertain the suit. (*The George*, 3 *Rob.* 211.) The learned counsel, therefore, might have spared the labor of pointing out the distinction between the two courts, of which we were perfectly aware, as well as of the one which could alone be resorted to in a case of this kind. Courts of common law, no doubt, take notice of the law of nations on questions arising incidentally, where the cause of action is of municipal origin; but it seems to be admitted by the plaintiff's counsel, that if the cause of action arises under the law of nations, the suit must be in the Admiralty Court. *This principle is clearly established in *Anthon v. Fisher*, (*Doug. Rep.* 648. note to *Cornu v. Blackburn*,) which was a case on a ransom bill, and the judgment of the Court of K. B. was reversed, in error, on the ground, that it being an action arising under the law of nations, a court of common law had no jurisdiction. The same principle is recognized in *Maisonnaire v. Keating*. (2 *Gallis. Rep.* 341, 218)

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342.) This is not a case of a marine trespass, but a pursuing, stopping, and detaining, by a belligerent as prize. The evidence, on both sides, agrees in showing, that the disaster in question arose out of the exercise of a belligerent right. The object, in the first instance, was search, and sending in for adjudication, if the search should warrant it. In *Lindo v. Rodney*, (*Doug. Rep.* 613.) Lord Mansfield lays down the distinction, with his usual clearness. "For seizing, stopping, or taking a ship on the high seas, *not as prize*, an action will lie." Such has been the doctrine of the *English* courts from *Le Caux v. Elen*, to *Faith v. Pearson*. (4 *Campb. N. P. Rep.* 457. 6 *Taunt. Rep.* 439.) The cause of action, if any, was pursuing and stopping the *Mary* for search, and with a view to *prize*, and arose out of the law of nations. The belligerent right of search does not belong to the municipal law. The plaintiff's vessel was chased as an enemy, or, at least, with a view to search for enemy's property. The exercise of this right of search leads to the capturing of neutral vessels, and carrying them in, for adjudication, in the prize courts of the belligerent. (*The Maria*, 1 *Rob.* 340. *The St. Jean Baptista*, 5 *Rob.* 33.) The defendant, independent of his commission, would have been a trespasser, in chasing the *Mary*. He had no right to chase, but under the law of nations. It is true, that the belligerent must exercise his right of search, according to the law of nations, otherwise he is responsible for damages. But in what court is the injured party to seek redress? We answer, in a court of the law of nations, because it is that law which is violated, and the tribunals which are erected under it are alone competent to punish the offender, and to redress the injured. But it has been said, with a sneer, that if this court does not take cognizance *of the case, the plaintiff must be driven to seek justice in a *British* court of admiralty. If this court has no jurisdiction, it will leave the plaintiff to seek his remedy in what other tribunal he may, as was done in the case of *Novion v. Hallett* in the Court of Errors. (15 *Johns. Rep.* 323.) It is the *quo animo*, with which the plaintiff's vessel was chased and stopped, that fixes the character of the transaction, and assigns jurisdiction to the court, to which it belongs to inquire into the conduct of the pursuer and captor, and to acquit or punish him, according to the circumstances of the case. If the defendant has violated any law, it is the law of nations, by abusing a right given to him by that law, and exercisable only under that law. It is an acknowledged principle, that "if a court has no jurisdiction of the principal question, it has none of its consequences and incidents." (*Case of Ferguson*, 9 *Johns. Rep.* 239. 241.) Now, what was the principal question in this case? Prize or no prize? To be determined, in the first instance, by *search*. The moment the *Atalanta* commenced her pursuit of the *Mary*, she acted under a belligerent right, for the due exercise

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of which, the defendant was answerable only in a prize court. The right of chase is founded on a public or private *commission* from the government, the validity of which may be drawn in question, and can only be examined in a prize court. It is said, that here was no taking as prize. But the *Mary* was pursued for the purpose of capture as prize, and was brought to, as such; though, before she could be boarded, the accident happened. What led to this accident? The chasing for the purpose of seizure or search. Suppose, after being detained and searched by the defendant, the *Mary* had been dismissed, will it be pretended, that the defendant would have been liable to an action of trespass? If there be any irregularity in the exercise of this right, must not the court which has jurisdiction of the principal matter, have cognizance, also, of this as an incident? How, otherwise, is the line of separation to be drawn between the jurisdiction of the courts of common law, and admiralty? Suppose, she had been taken possession of, and lost by the negligence of the captors, it will not be pretended, that trespass would lie, or that *the admiralty would not have jurisdiction? And suppose an irregularity before capture, is a court of common law to have jurisdiction of that, and the Admiralty Court of the subsequent seizure? If the misconduct of the captor, after capture, cannot oust the admiralty of its jurisdiction, it is not easy to see how any misconduct connected with the taking can have that affect. If the *Mary* had been actually taken possession of as prize, then it must be conceded, that no action would lie, whatever might have been the misconduct of the defendant; but recourse must have been had to the admiralty alone. Yet it is urged, on the other side, that if there be misconduct in the act of taking, or attempting to take possession as prize, the aggrieved party may resort to a common law court. Can jurisdiction be separated by such imaginary boundaries? The whole belongs to a common law court, or to the Admiralty. As the entire proceeding related to a matter of prize, the Court of Admiralty must embrace the whole subject. Again; suppose the *Mary* had been an enemy, or was carrying contraband of war, she would have been lawful prize of war, and no action could have been maintained for taking or sinking her voluntarily; consequently, no action could lie for sinking her, through negligence. Thus the question of prize or no prize, springs out of the transaction, in whatever light it be viewed. "If," says Mr. Justice *Story*, in the case already cited, "a question of *prize* be necessarily involved in the foundation of an action, whether it be a principle or an incident, I shall be glad to learn how the common law can draw it *ad aliud examen* than the prize jurisdiction." The *English* cases on this subject are all collected, and the doctrine which they contain, so fully and learnedly examined by his honor, the chancellor, in the opinion delivered by him in the case of *Novion v. Hallett*, in the Court of Errors, that it would be

us less to attempt to add any thing to the weight and authority of that opinion.

The argument, thus far, has proceeded on the ground that the *Mary* was only pursued and stopped, but not taken. It remains to show, that she was, in effect, captured. The *Mary* had *hove to*, and submitted, as much as if, being an enemy, she had struck her colors. She was under the *control of the defendant, and it is for an injury received while within his power, that this action is brought. It was equivalent to an actual or hostile capture. In the case of *The Rebeckah*, (1 Rob. 227. 233.) Sir William Scott says, "the first question that will occur, applies to the time of the capture, whether that is to be dated from the actual taking of possession, or the previous striking of the colors; and I think, that the striking of the colors is to be deemed the real *deditio*." Here, then, the heaving to was equivalent to the striking of colors, and was such a capture as gave jurisdiction to the Court of Admiralty; and that court has competent power to afford full and adequate relief, not only in regard to the property of all persons on board, but for any personal injuries alleged.

It only remains to show, that the Prize Court of Admiralty in *England* does take cognizance of cases of this kind, and that it is competent to afford full and adequate relief. In the language of Ch. J. *Willes*, "if there is a remedy in the Admiralty Court, that is sufficient."

Where property is taken as prize, and not libelled, or is libelled irregularly, or is lost by the negligence or misconduct of the captor, proceedings may be instituted in the admiralty to compel him to proceed to adjudication, and in default of which he will be decreed to pay the value of the property, and all damages. (*The Betsey*, 1 Rob. 93. *The Corier Maritimo*, 1 Rob. 237. *The Huldah*, 3 Rob. 335. *The Karason*, 5 Rob. 291. *The William*, 6 Rob. 316. *The Susannah*, 6 Rob. 48. *The Der Mohr*, 3 Rob. 129. 4 Rob. 314. *The Lucy*, 3 Rob. 208. *The William*, 4 Rob. 214.) These cases point out the remedy that should have been pursued, in this case, by the plaintiff, if the injury of which he complains, really existed.

This court cannot afford him relief, without assuming a jurisdiction that does not belong to it.

SPENCER, Ch. J. The verdict of the jury was for the plaintiff; and agreeably to an intimation from the judge, that if they found for the plaintiff, they should state the grounds of their verdict, they added, *that the disaster was the result of gross negligence in the defendant*. Among the *points taken, on the motion for a new trial, it has been strenuously urged by the defendant's counsel, that the action should have been *case*, and not *trespass*. This point is open to the defendant, because in the progress of the trial, a motion was made for a nonsuit,

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after the plaintiff had gone through with his evidence, on that ground.

We must consider, after the finding of the jury, that the injury done, by running down the plaintiff's vessel, was not designed, or intentional; but that it proceeded from the defendant's negligence, as captain and commanding officer of the *Atalanta*. We are bound, also, to consider the negligence as a personal one, imputable to the acts and omissions of the defendant; and that these acts and omissions were gross and palpable.

That the force by which the plaintiff's vessel was destroyed, was the immediate cause of her destruction, proceeding from the collision, cannot be doubted; and then the question arises. whether, if such an act, producing the injury immediately and directly, be the result of negligence, and not of a wilful intention, the action ought to be trespass or case. In the case of *Leame v. Bray*, (3 *East*, 593.) all the authorities and preceding cases bearing on this question, were reviewed. That was trespass, charging the defendant with having drove and struck a single horse chaise which the defendant was driving along the highway, with such great force and violence upon and against the plaintiff's curricule, which his servant was driving, that by means thereof, the servant was thrown out, and the horses ran away with the curricule; and the plaintiff, to preserve his life, jumped and fell from the same, and fractured his collar bone. It appeared in evidence, that the accident happened in a dark night, owing to the defendant's driving his carriage on the wrong side of the road, the parties not being able to see each other, and that if the defendant had kept the right side of the road, there was ample room for the carriages to pass without injury; but it did not appear that blame was imputable to the defendant in any other respect; and on an objection, that the injury happened from negligence, and was not wilful, and that the proper action was case, and not trespass *vi et armis*, *the plaintiff was nonsuited. After argument, the nonsuit was set aside by the unanimous opinion of the court. Lord *Ellenborough* said, the true criterion seemed to be, according to what Lord Ch. J. *De Grey* said, in *Scott v. Shepard*, (3 *Wils.* 411. S. C. 2 *Bl. Rep.* 892.) whether the plaintiff received an injury by force from the defendant; that if the injurious act be the immediate result of the force originally applied by the defendant, and the plaintiff be injured by it, it is the subject of an action of trespass *vi et armis*, by all the cases both ancient and modern: that it was immaterial, whether the injury be wilful or not; and speaking of the case of *Ogle v. Barnes*, (8 *Term Rep.* 128.) he approved of the decision, though there were words which implied force by the act of another; but it did not appear that it must have been the personal act of the defendants, it not being alleged that they were on board the ship at the time; and he observed, he was not

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aware of any case of that sort, where the party himself sued, having been on board, this question had been raised. Mr. Justice *Lawrence*, who gave an opinion in *Ogle v. Barnes*, observed, that he did not mean to say, that the distinction turned on the wilfulness of the act, and he so understood Mr. Justice *Grose*; that what he principally relied on there, was, that it did not appear that the mischief happened from the personal acts of the defendant. That the defendant negligently did such an act, might be sustained by showing that it was done by his servant in his employ, in the absence of the master. *Grose, J.*, expressed himself very decidedly; he observed, that in looking into all the cases from the year-book in the 21 H. VII. down to the latest decision on the subject, he found the principle to be, that if the injury be done by the act of the party himself at the time, or he be the immediate cause of it, though it happen accidentally, or by misfortune, yet he is answerable in trespass. *Le Blanc, J.*, is equally explicit. He says, "In all the books, the invariable principle to be collected is, that where the injury is immediate on the act done, there trespass lies; but where it is not immediate on the act done, but consequential, then the remedy is in case." He illustrates the distinction by the case of a log thrown in the *highway. If, at the time of its being thrown, it hit any person, it is trespass; but if, after it be thrown, any person receive an injury by falling over it, it is case. He observed, that it was chiefly in actions for running down vessels at sea, that difficulties may occur, because the force which occasioned the injury is not so immediate from the act of the person steering. The immediate agents of the force, (he said) are the winds and waves, and the personal act of the party rather consists in putting the vessel in the way to be so acted upon; and whether that may make any difference in that case, he would not then take upon himself to determine. I do not consider it necessary to review the antecedent cases. They all support the distinction taken by the judges in *Leame v. Bray*. I will merely refer to some of them. (6 Term Rep. 128. 8 Term Rep. 191. Hob. 134. 1 Str. 596. 5 Term Rep. 649. 1 Str. 636.) It was strongly insisted, that *Leame v. Bray* was overruled by *Nicholson and another v. Mounsey & Symes*, (15 East, 383.) but that is a mistake. That was a case against the captain and first lieutenant of a sloop of war, for negligently conducting the ship, so that, through mere negligence, bad management, and want of care, she with great force, ran foul of and struck the plaintiff's ship, by reason whereof, it was sunk and lost. The cause was referred, and the arbitrator reported, that at the time the mischief happened, *Symes*, the lieutenant, was the commanding officer of the watch, and was upon deck and directing the steering and navigating the sloop of war; that *Mounsey* was not on deck, nor was he called upon by his duty to be so; that he had not the appointment of the officers; but he, as well as

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they, were appointed by the commissioners of the admiralty. The arbitrator awarded for the plaintiff 4,500 pounds, damages, against both the defendants. The case underwent a full discussion upon the question, whether *Mounsey* was liable at all; and the court held him not liable, on the ground, that he was a servant of his majesty, stationed on board that ship, to do his duty there, together with others, appointed and stationed there by the same authority, each having their several duties to perform, and that there was no personal interference of the captain with the act of the lieutenant, *by which the damage was occasioned, and that he ought not to be liable for the act of another, whom he did not appoint or employ; and the award was set aside as regarded *Mounsey*; but judgment was given against the lieutenant. The case does not detail the evidence, nor was there a word said about the form of the action; but it does not admit of a doubt that had *Mounsey*, the captain, been on deck, in the discharge of his duty, when the accident happened, that he would have been made responsible; for *Symes*, who was the acting officer, and directed the steering and navigating the sloop of war, was held answerable, without question or doubt. The case of *Stort v. Clements*, (*Peake's N. P.* 107.) was decided on the same principle, as was also the case of *Boucher v. Naidstrom*, (1 *Term Rep.* 569.) The case of *Covel v. Laming*, (1 *Camp. N. P. Rep.* 497.) which was subsequent to the case of *Leame v. Bray*, was an action of trespass for running the defendant's ship against the plaintiff's. It appeared, that when the accident happened, the defendant stood at the helm, and that he wished to steer clear of the plaintiff, and if he was to blame, it was through ignorance and unskilfulness. On the objection that trespass would not lie, Lord *Ellenborough* confirmed the doctrine he had delivered in *Leame v. Bray*, and said, it made no difference that the parties were sailing on ship-board. The defendant was at the helm, and guided the motions of his vessel. The winds and the waves were only instrumental in carrying her along in the direction which he communicated; the force, therefore, proceeded from him, and the injury the plaintiff sustained was the immediate effect of that force; and the plaintiff had a verdict.

The Court of Common Pleas have, undoubtedly, questioned the correctness of the decision in *Leame v. Bray*, though they have not overruled it. In *Rogers v. Imbleton*, (5 *Bos. & Pull.* 117.) the declaration was, that the defendant drove his cart against the plaintiff's horse, with force and violence, whereby he was hurt and bruised, by and through the mere negligence, inattention, and want of proper care, of the defendant. The declaration was demurred to, on the ground that it ought to have been trespass. The court intimated a clear opinion, that as the injury was alleged to have arisen *from mere negligence, inattention, and want of care, the demurrer could not be sustained. Ch. J. *Mansfield* said, that it was not to be considered,

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that the case of *Leame v. Bray* was overturned by that decision; but, he said, it might, on a proper case, be proper that that decision should be re-considered. In *Huggett v. Montgomery*, (5 Bos. & Pull. 446.) the action was trespass for driving a certain ship or vessel, whereof the defendant was commander, to and upon and over a certain boat of the plaintiffs, and sinking her. It appeared, the defendant was master and owner of the vessel committing the injury, but though on board at the time, did not give the order which caused the accident; but the pilot did. The jury were of opinion, that the accident arose from negligence, and gave a verdict for the plaintiff. The court were of opinion that trespass could not be maintained against the defendant, and said, the case differed from *Leame v. Bray*, intimating, at the same time, doubts as to the authority of that case. In *Turner and others v. Hawkins and others*, (1 Bos. & Pull. 472.) the plaintiff declared in case, for sinking his boat, and alleged the injury to have happened by the defendants not slackening the rope or line by which his boat was drawn, and then stated that the plaintiff's boat was driven and forced across the stream, and sunk. There was a verdict for the plaintiffs; and on a writ of error to the exchequer chamber, the error assigned was, that the act complained of was a trespass *vi et armis*. *Eyre*, Ch. J., said, that when the objection is taken after verdict, the point ought to be very clearly made out. That it was clear that the cause of action was a nonfeasance, in not slackening the rope, and that it was fair to infer, that it was not intended to charge the defendants with wilfully driving their boat against that of the plaintiffs, and that all the circumstances were referable to the nonfeasance, which made it a complete action on the case, and the judgment was affirmed. In *Blinn v. Campbell*, (14 Johns. Rep. 432.) the plaintiff sued in an action on the case, and it appeared that the defendant, being a trooper, had wounded the plaintiff's leg, by negligently firing a pistol. We held, that if the injury is attributable to negligence, though it were immediate, the party injured has his election, either to treat the negligence of the defendant as the cause of action, and declare in case, *or to consider the act itself as the injury, and to declare in trespass. The rule is laid down in the same manner in 1 *Chitty Pl.* 127. and is warranted by the cases he cites.

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I am perfectly satisfied, from a review of the cases, that if the defendant is liable at all, this action is appropriate, and that it ought to have been trespass rather than case, as the injury was immediate, and from gross negligence.

2. It has been objected, that the answers of *Parker and Dodd* to the thirteenth interrogatory, ought not to have been read to the jury. These answers relate to the value of the vessel and cargo, and the interrogatory is the general one. It has been contended, that under that interrogatory, nothing can be answered, but what has been before specifically inquired

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into. This has not been shown to be the practice in courts proceeding according to the civil law. I perceive no abuse likely to follow from allowing the witnesses to state every material fact under that interrogatory, not before drawn forth by the special interrogatories, and such, undoubtedly, was the object and end of the general interrogatory. It certainly was not intended to have the witnesses repeat what they had before said; that would be idle and unnecessary. As the facts stated by the witnesses are pertinent, I am of opinion, that they were properly allowed to be read to the jury.

3. It has been insisted, that the verdict was contrary to evidence. This has opened a wide range of inquiry, and I have carefully and attentively read and considered the testimony stated in the case. Very much depends on the credibility of the witnesses; and it became a very important part of the inquiry, whether the accident was attributable to design or negligence on the part of the defendant, or whether it was involuntary and inevitable. It was distinctly placed before the jury, that if it was the result of design or negligence, that then the defendant was answerable for the consequences; but if it was involuntary and inevitable, then he was not answerable, and a verdict ought to be found in his favor. It was a most material fact, in this view of the case, whether the night was so dark, that those on board the *Atalanta*, either with the naked eye, or with night glasses, could see the *Mary*, or not, when she was at a considerable distance from the *Atalanta*. If she could be seen at a reasonable distance, say half, or a quarter of a mile, then the conclusion seems inevitable from all the testimony, that the collision might have been avoided. If *Ephraim Howard*, the mate of the *Mary*, is to be believed, the night was not so dark but that the *Mary* might have been seen so far distant as to have been avoided; and it appears from the evidence of Captain *Pechell*, that he saw the operations of the *Mary* from the *Cleopatra*, at half past nine, and when the vessels closed. This last ship was at a much greater distance from the *Mary* than the *Atalanta*; and it appears, that the *Atalanta* came up with the *Mary*, a little after eight o'clock, when muskets and a carronade were fired at the *Mary*. Captains *Coffin* and *Collins*, after being informed of the manœuvres of the vessels, agree in saying, that if the *Atalanta* had starboarded her helm, she would, in a length and a half, have cleared the *Mary*, if the latter was right a head; and they concur in the opinion, that the *Atalanta* must have seen the *Mary*, from the course she steered. It seems to be agreed, on all hands, that a chasing vessel is bound to take measures to avoid running foul of the chase. All the witnesses concur in saying, that it would have been extremely imprudent, as regards the safety of the *Atalanta*, to have intentionally run foul of the *Mary*, and those acquainted with Captain *Hickey*, exonerate him from any suspicion of such intention. The jury have,

in effect, acquitted him of any design to run down the *Mary*. They say it was the result of gross negligence. This was a matter of fact, and I cannot pretend to means of deciding the fact superior to what the jury possessed ; and, on such a question I am free to acknowledge, that an honest, capable, and upright jury are the most competent to come to a correct conclusion. I cannot, therefore, say, that the verdict is against evidence.

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4. An exception has been taken to the admission of *E. Howard*, the mate of the *Mary*, as a witness, on the ground that if the plaintiff recovers, it is equivalent to the performance of the voyage, and the insuring of freight ; and that he will then be entitled to be paid his wages. It has been conceded, that in the case of capture and condemnation, though the owner recovers the amount of freight against the insurers, the mariners are not entitled to wages. There has been no decision, of which we are apprised, upon the present point. From analogy to the admitted principle, that a recovery from the insurer does not give the mariner a right to recover wages, there would seem to be no objection to *Howard*, on the score of interest ; and I conclude that he was a competent witness.

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5. Although the defendant's counsel excepted to the opinion of the judge, at the circuit, excluding copies of the proceedings instituted by the plaintiff, against the defendant, in the High Court of Admiralty of *Great Britain* to recover damages for the injury which is the basis of this action ; and also for excluding certain affidavits, with exhibits annexed, taken in the admiralty case, it has not, as I understand, been made a distinct ground of argument, that these proceedings were entitled to be admitted. The pendency of another suit for the same matter could, at most, only be pleaded in abatement. It is not pretended that any decision was ever made in the admiralty ; nor that any witnesses examined in that suit are dead, or in a situation not to be re-examined. Under these circumstances, those proceedings were properly excluded.

6. It has been strongly insisted, that this court has not jurisdiction of the cause ; that it is a case of admiralty, not of common law cognizance.

The case of *Novion v. Hallett*, (16 *Johns. Rep.* 327.) decided in the Court for the Correction of Errors, and the learned and elaborate opinion delivered by Chancellor *Kent*, settles, incontrovertibly, that if the original taking was as prize, the Court of Admiralty has exclusive jurisdiction of the case ; that the jurisdiction is not affected by the fact that the capture was illegal, or violent, or unjust ; that where the admiralty jurisdiction has once attached, by means of such taking as prize, it never can be divested by any matter subsequent, so as to give a court of common law jurisdiction over the case, as a *tort* or trespass ; and that the admiralty having jurisdiction of the principal subject, thereby acquires jurisdiction of all the incidents.

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That court did not profess to decide in what cases courts of common law have jurisdiction of marine *torts*; the case itself did not require *an examination of that question, and no opinion was pronounced upon it.

Dr. *Brown*, in discussing the powers and jurisdiction of the admiralty, (2 *Brown's Civil and Ad. Law.* 111.) observes, that collisions, or ships running foul of one another, by which one or both are sunk or battered, afford cases of the most frequent occurrence; and he says, that for this damage, if done at sea, remedy may be had in the admiralty. He then comes to consider whether, for such injuries, courts of common law have a concurrent jurisdiction. This, he says, may have been doubted, but he thinks it clearly settled, in practice, that they have jurisdiction where the proceeding is not *in rem*, but merely for damages. He says, Sir *Leoline Jenkins* considered the bringing an action of *trover*, for a *tort* on the high seas, as an invasion of the authority of the admiralty. Sir *L. Jenkins* shows the superior facility and convenience of a suit in the admiralty, where the whole subject matter can be investigated and adjudicated in a single suit, whereas, at law, many might be necessary.

It is well known to those conversant with admiralty proceedings, that the court is two-fold: an *instance court*, which takes cognizance of contracts made, and injuries committed on the high seas; and the *prize court*, which has jurisdiction over prizes taken in time of war. The commissions to hold these courts are distinct, though usually given to one person. The *instance court* is governed by the civil law, the laws of *Oleron*, and the customs of the admiralty modified by statute. The *prize court* is to hear and determine according to the course of the admiralty, and the law of nations; (2 *Brown's Civil & Adm. Law.* 29.) and it cannot be doubted, that when we find it asserted in the books, that for a marine tort merely, redress can be sought in the admiralty, it is always meant in the *instance court*.

It is not to be denied, that the defendant, as the commander of a vessel of war belonging to his *Britannic* majesty, had a right, war then existing between *England* and *France*, of visiting and searching neutral merchant ships upon the high seas. This, by the laws of nations, is an incontestable right of the lawfully commissioned cruisers of a belligerent *nation. A mere attempt, on the part of the neutral merchant vessel, to escape before any possession is taken by the cruiser, is not unlawful, nor does it draw after it the consequences of a condemnation. (*Chitty's Laws of Nations*, 192, 194, 195.) In the present case, therefore, the pursuit of the *Mary* by the *Atalanta*, for the purpose of a search, was a lawful act. But it has been insisted, that the defendant, and those on board the cruising ships, believed the *Mary* to be a *French* vessel; that she was pursued as such, with intention to capture her as prize of

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war; and although it turned out that she was not a *French* vessel, but an *American*, and a neutral, yet the acts of the defendant were done with intention to capture her, and that, therefore, the question is one of prize or no prize, and of admiralty jurisdiction. I cannot assent to this conclusion. The intention to capture the *Mary*, as a prize, depended altogether on the supposition, that she was a *French* vessel. It did not exist, if she was, in fact, an *American* vessel. It was, therefore, a conditional intention, depending on the event. As the character of the *Mary*, during the chase, was uncertain, the defendant was bound to conduct himself in such a manner, that his acts should be justified by the event. The intention, in a given event, to make her a prize, did not constitute the actual pursuit of a prize. There is nothing in the whole course of the transaction to show that, in point of fact, the defendant treated the *Mary* as a prize, or that when her national character was discovered, he would have detained her as prize, or for any violation of neutrality. I cannot, therefore, consider the injury received by the *Mary*, in any other light, than as a marine trespass.

The cases of *Le Caux v. Eden*, (*Doug.* 526.) *Lindo v. Rodney*, (*Doug.* 591. note 1.) *Smart v. Wolff*, (3 *Term Rep.* 323.) and many other cases which might be cited, recognize the principle, that for seizing, stopping, and taking a ship on the high seas, not as prize, an action lies at the common law; that a thing being done on the high seas, does not exclude the jurisdiction of the common law; but that for taking as prize, no action will lie at the common law, and that the nature of the question did not exclude the locality of the fact. A marine trespass, *free from the circumstance, that the vessel was taken as prize, is cognizable, concurrently, in the courts of common law, and in the *instance* court of the admiralty. The latter court has no more jurisdiction of the question of prize or no prize, than a court of common law. It has been supposed, that the defendant's conduct can only be inquired into in the admiralty, as it may involve questions of state, the discussion and decision of which may compromit the peace of the nation. Those are considerations to which this court cannot listen, if they have jurisdiction of the cause. We are not at liberty to assume or decline jurisdiction, upon speculative grounds, or for reasons of public policy.

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It has been thrown out, that for aught we know, *British* cruisers, at the time this injury was committed, having a right to overhaul neutrals, to search for contraband goods, and to carry them in for adjudication, may, also, have had instructions, in case of any attempt on the part of neutrals to escape, to run them down; and that therefore the trespass, in this case, may have been committed in the exercise of a belligerent right, and, consequently, a court of common law has not jurisdiction. The facts show that the *Mary* had submitted, and was in the act

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of coming under the *Atalanta's* stern, when the injury took place. The pursuit then was over, and it cannot be tolerated, nor will the court infer, that the running foul of the *Mary* was in obedience to any orders given by the commissioners of the admiralty. I again say, that I perceive nothing in the case giving rise to the question of prize or no prize—nothing involving the laws of nations, or the *jus belli*. I perceive nothing but a maritime tort; and, until instructed to the contrary, of such torts, whether committed by a belligerent cruiser upon a neutral, under such circumstances, or by a merchant ship, I cannot but think we have jurisdiction. I am therefore of opinion, that the motion for a new trial ought to be denied.

YATES, J., and WOODWORTH, J., concurred.

VAN NESS, J., and PLATT, J., were of opinion that the verdict ought to be set aside, and a new trial granted.

Motion denied.

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K. a soldier, entitled to military bounty lands, by a deed, dated January 12th, 1788, granted, bargained and sold, for a valuable consideration, to B. all the bounty lands to which he was entitled; and in the same deed empowered A. as his attorney, for him, and in his name, to grant, bargain and convey the same to B. his heirs and assigns, in case the same should be necessary, upon the grants having passed the great seal of the state, for such bounty lands. On the 25th of February, 1792, K. by deed, for a valuable consideration, granted, bargained and con-

THIS was an action of ejectment, commenced in May, 1818, to recover part of lot No. 40, in the town of *Ulysses*, and was tried at the *Tompkins* circuit, in June, 1819, before Mr. Justice *Woodworth*. The plaintiff gave in evidence, (1.) a patent to *Alexander Kidd*, a soldier, for lot No. 40, in the township of *Ulysses*, dated July 8, 1790. (2.) A deed from *Alexander Kidd* to *Isaac Bogart*, dated the 12th of January, 1788, as follows: "Know all men by these presents, that I, *Alexander Kidd*, of the county of *Albany*, for the consideration of nine pounds, have granted, bargained, sold, assigned and set over unto *Isaac Bogart*, of the city of *Albany*, the bounty or gratuity of lands given and granted unto me, the said *Alexander Kidd*, by any resolution of the congress of the *United States*, and by any resolutions or laws of this state, for my services as a private in the troops of this state, in the service of the *United States* in the regiment commanded by, Colonel *Gose Van Schaick*; and do empower *Henry I. Bogart* and *John Bogart*, or either of them, my true and lawful attorneys and attorney, for me and in my name, to grant, bargain and convey the same to the said *Isaac Bogart*, his heirs and assigns, in case the same shall be deemed necessary, upon the grants having passed the seal of this state, for the lands aforesaid. Witness my hand and seal," &c. "Witness, *John Bush*." This deed was proved on the 30th of September, 1790, before *Jeremiah Lansing*, a master in chancery; and again, on the 27th of April, 1818, before *Bowen Whiting*, master in chancery, when the witness who

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was present to make the proof was identified by a witness known to the master: the deed was also proved, *by the same subscribing witness, before *Elijah Miller*, first judge of the county of *Cayuga*, on the 5th of *May*, 1818, and recorded in the office of the clerk of that county on the 6th of *May*, 1818.

(3.) A deed from *Isaac Bogart* for the same lot to *Theodosius Fowler*, dated *July 2*, 1791, registered 30th of *April*, 1795, as noted on the copy produced, and recorded *February 28th*, 1818. (4.) A deed from *Theodosius Fowler* to *William Henderson*, the lessor of the plaintiff, for the same lot, dated *October 4*, 1792; recorded *August 14*, 1818. (5.) A release in fee from *Alexander Kidd*, by his attorney *Henry I. Bogart* to *Isaac Bogart*, for the lot in question, dated 9th of *February*, 1802; acknowledged 10th of *August*, 1808, but not recorded. *Isaac Bogart* died in *September*, 1818.

The defendant gave in evidence, (1.) a deed from *Alexander Kidd* to *Lemuel Cobb*, dated *February 25*, 1792, for the lot in question, as follows: "Know all men by these presents, that I, *Alexander Kidd*, of the county of *Morris*, in the state of *New-Jersey*, for the consideration of the sum of ten pounds, current lawful money of *New-Jersey* aforesaid, do give, grant, bargain, sell, aliene, release, enfeoff, convey and confirm unto *Samuel Cobb*, of the same place, and to his heirs and assigns for ever, all my bounty lands, viz. five hundred acres due to me from the state of *New-York*, and one hundred acres due from the *United States*; also, all my right and title, interest, claim and demand to the warrants and rights to land for my services in the troops raised in the said state of *New-York*, in Colonel *Gose VanSchaick's* regiment, together with all and singular the profits, privileges and appurtenances to the said lands, warrants and premises belonging: to have and to hold unto the said *Samuel Cobb*, his heirs and assigns, all the above granted and bargained land and premises, with the appurtenances to the same. In witness whereof," &c. "Sealed and delivered in presence of *Thomas Van Winkle—Peter Van Winkle*." This deed was proved on the 12th of *March*, 1795, before *John Ray*, a master in chancery, by *Peter Van Winkle*; and before *David Hyde*, a master in chancery, on the 12th of *June*, 1813, by *Thomas Van Winkle*; and recorded in the office of the clerk of the county of *Cayuga*, *June 12th*, 1813, with the soldier's *discharge, dated 8th *June* 1783, under the hand of the commander in chief of the army of the *United States*. (2.) A deed from *Samuel Cobb* to *Moses Davenport*, the defendant, for 200 acres of the same lot, being the premises in question, dated *January 31*, 1815, for the consideration of 1000 dollars; recorded 16th *February*, 1815. (3.) A release from the widow of *A. Kidd* to the defendant, of her right of dower, dated 14th *February*, 1816.

The defendant then called on the plaintiff to show that the deed from *Kidd* to *Bogart* was deposited, previous to *May 1*,

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veyed his same bounty lands to C., his heirs and assigns for ever: And on the 9th of *February*, 1802, A., as the attorney of K. in his name, executed a release to B. in fee, pursuant to the power contained in the first deed: Held, that the deed from K. to B. conveyed a life estate only, and that K. having conveyed to C. before the execution of the power given to A., all his reversionary interest, C. as a bona fide purchaser, without notice, became seized of the legal estate in the premises, on the death of B.

Where the title of the lessor, in ejectment, being a life estate, ends before the trial of the cause, the plaintiff, though he cannot turn the defendant out of possession, is entitled to judgment, so as to enable him to recover the mesne profits.

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but with a perpetual stay of the writ of possession.

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1795, with the clerk of the county of Albany, in pursuance of the provisions of the "act for registering deeds and conveyances, relating to the military bounty lands," passed *January 8, 1794*, and the act to amend the same, passed *March 27, 1794*. The counsel for the plaintiff contended, that the exemplifications of the record and proofs thereof, produced and read in evidence, were sufficient proof of that fact; and the question was reserved by the judge.

Cornelius Davenport, the father of the defendant, died about two years before the trial; and his widow, who was produced as a witness, testified, that more than 22 years before, her husband made a contract with *Nathaniel Williams*, in *New-Jersey*, for lots No. 33 and 40, at 2 dollars per acre, and paid him 500 dollars, and took a bond for a deed; that he entered on the lot 22 years ago, and continued in possession, holding under this contract, and paying taxes, until his death. The bond was not produced. The witness said that she had seen it and heard it read, and had made search and inquiry after it, but could not find it. The plaintiff's counsel objected to the parol evidence of the contents of the bond; but the judge admitted it, subject to all exceptions; and he ruled that it was not necessary for the defendant to show any written evidence of the color or claim of title, under which he took possession; but that showing an actual occupation, for twenty years, claiming title, was sufficient to constitute an adverse possession. Another witness testified, that *C. Davenport* was in possession of lot No. 40, above twenty-two years before the trial, and claimed it to be his property, saying that he had purchased it of a person in *New-Jersey*; and that *C. D.* built a house and *barn on the lot, and his son, the defendant, made improvements from year to year.

A witness for the plaintiff testified that before the defendant purchased of *Cobb*, he had taken a lease, for a number of years, of *Cobb*, and that he held under that lease when he made the purchase, and that he paid the rent to *Cobb*. That he knew of *Bogart's* title or claim, and would not purchase, until he had ascertained who had the title, and that *C. Davenport* often told the witness the same. That the defendant married in 1801 or 1802. That about 10 or 12 years ago, the defendant, who was then in actual possession of the premises, employed the witness to inquire for *Theodosius Fowler*, who derived title from *Bogart*, and was the owner of the lot. The counsel for the defendant contended that it was solely for the jury to decide, whether on this evidence, the plaintiff's right was not barred by an adverse possession. The judge directed the jury to find a verdict for the plaintiff, subject to the opinion of the court, on all the points arising in the case: and the jury found a verdict for the plaintiff accordingly.

The cause was argued by *Oakley*, (attorney general,) and

W. A. Duer, for the plaintiff, and by *Collier*; for the defendant; but the reporter did not hear the arguments.

For the plaintiff, the following points were stated :—1. That there was not evidence of an adverse possession, sufficient to bar the plaintiff. (1 *Johns. Rep.* 156. 2 *Johns. Rep.* 230. 9 *Johns. Rep.* 167. 174. 10 *Johns. Rep.* 475.)

2. That the proof as to the deposit of the deed from *Kidd* to *Bogart*, before the 1st of May, 1795, pursuant to the act, (1 *N. R. L.* 209. 211, 212. 217.) was sufficient.

3. That the deed from *Kidd* to *Bogart* passed the whole estate of *Kidd*, and the patent which was subsequently issued to him enured to the benefit of the grantee, *Bogart*, (16 *Johns. Rep.* 495. 505.) as by the act to carry into execution the concurrent resolutions of the legislature, (Sess. 13. ch. 59. s. 5.) the land became vested in the soldier, on the 27th of March, 1783.

4. Admitting even that *Bogart* did not, by the deed from *Kidd* to him, acquire an estate in fee; yet the subsequent deed executed by the attorney of *Kidd*, pursuant to the power contained in the first deed, enured to the benefit of *Bogart*, so as to vest in him the whole estate. (3 *Johns. Ch. Rep.* 550. 4 *Cruis. Dig.* tit. 32. ch. 16. s. 62, 63, 64, 65. 1 *Johns. Cases*, 81. 90. 2 *Johns. Rep.* 510. 13 *Johns. Rep.* 316. 2 *Burr.* 704. *Doe v. Whitehead*, 1 *Saund.* 261. note 3.)

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SPENCER, Ch. J., delivered the opinion of the court. The lessor deduced a title to the premises in question under *Alexander Kidd*, a soldier, to whom the lot in controversy was granted, by virtue of a deed from *Kidd* to *Isaac Bogart*, dated the 12th of January, 1788, and sundry mesne conveyances down to the lessor.

The defendant deduced a title from *Kidd* to *Samuel Cobb*, by a deed, dated the 25th of February, 1792, for the same lot; and by a deed from *Cobb* to the defendant, for 200 acres of the lot, being the premises in question, dated the 31st of January, 1815.

It has not been pretended that the defendant is concluded, by any relation subsisting between him, or *Cornelius Davenport*, his father, and the lessor, or those under whom he claims, from showing that the plaintiff has no title to recover; or that the defendant, or his grantor, *Cobb*, has the title to the premises.

The deed from *Kidd* to *Isaac Bogart* conveys only a life estate. It is a grant, for the consideration of nine pounds, to *Bogart*, of *Kidd's* bounty or gratuity lands, under any resolution or laws of this state, for his services as a private in the troops of this state, in the service of the *United States*, in the regiment commanded by Colonel *Gose Van Schaick*, without any words of inheritance or perpetuity. It constitutes *Henry I. Bogart* and *John Bogart*, or either of them, his true and lawful attorneys and attorney, for him and in his name, to grant, bargain and convey the same (his bounty lands) to the said *Isaac Bo-*

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gart, his heirs and assigns, in case the same should be deemed necessary upon the grants having passed the seal of this state for the lands aforesaid.

The power thus given was executed by a deed from *Henry I. Bogart* to *Isaac Bogart*, for the lot in question, by a *release, dated the 9th of *February*, 1802, which was acknowledged the 10th of *August*, 1808, but has not been recorded. It is to be observed, that the deed from *Kidd* to *Isaac Bogart* has been deposited pursuant to the act of the 8th of *January*, 1794, but has not been recorded. There is no evidence tending to show that *Cobb* had any notice of the deed from *Kidd* to *Isaac Bogart*, when he purchased and took his deed. This action was commenced in *May*, 1818, and *Isaac Bogart* died in *September* of that year.

The question then arises, whether, since the death of *Isaac Bogart*, the lessor, or *Cobb*, and those claiming under him, have the legal title to the premises? This depends on the power contained in *Kidd's* deed to *Bogart*. It has been insisted, on behalf of the plaintiff, that the power, in this case, is coupled with an interest, and was irrevocable, so that *Kidd* had no interest left in him to convey. On the part of the defendant it has been urged, that the power being to strangers who had no interest in the land, notwithstanding it was contained in the deed to the person in whose behalf it was to be executed, it was a naked power collateral to the land. The question, as to powers, arose, and was finally decided in the Court of Errors, in the case of *Bergen and another v. Bennet*, (1 *Caines's Cases in Error*, 1.) Mr. Justice *Kent* delivered the opinion of the court. He observed, that "a power simply collateral and without interest, or a naked power, is where to a mere stranger authority is given of disposing of an interest in which he had not before, nor hath by the instrument creating the power, any estate whatsoever. But when power is given to a person who derives under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power, relating to the land." "The former power," he says, "is revocable by the grantor, at his pleasure, in his life-time, and is absolutely revoked by his death; and the grantee of such a naked power, having no interest connected with the power, has, of course, no interest affected by the revocation." In *Hargrave & Butler's* note, 298, to book 3d, of the first part of *Coke's Institutes*, it is said, that those powers which are given to mere strangers, that is, to persons who were not owners of the land, at the execution of the *instrument creating the power, and who do not take under it, either a present or future estate or interest in the land, are said to be collateral to the land; those which are reserved to the owner of the land, or to a person deriving under the instrument creating the power, either a present or future estate or interest in the land, are said to be relating to the land. These principles are believed to be un

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deniable propositions, perfectly well settled by adjudications, and admitted by every elementary writer on powers. Their application to the present case is obvious. *Henry I Bogart* and *John Bogart*, who, or either of them, were authorized to make the conveyance to *Isaac Bogart*, were not owners of the land, at the execution of the instrument creating the power, and did not take under it a present or future estate or interest in the lands. They are, therefore, strangers, and, as to them, the power is collateral to the land. I can perceive no difference, in point of principle, whether the power is contained in the same instrument which gives a life estate to *Isaac Bogart*, or in a distinct instrument. The place where the power is found is not the test, but it is, that the same person who takes a present, or is to have a future interest in the land, is clothed with authority by the owner of the estate, to make a further disposition of it. The attorneys in this case had no kind of interest in the particular estate conveyed, or in the further disposal of it. All their authority was derived from the deed, and the only interest they had was in the execution of the power. It was matter of entire indifference to them who had the estate, and this is the true character of a naked power. Had the deed, after giving the life estate, authorized *Isaac Bogart* to convey the premises in fee, for his own benefit, in consideration of the money received, that would have been a power coupled with an interest, irrevocable in its nature. But that is not the case. Although *Isaac Bogart* had an interest in having the power executed, *H. & J. Bogart* are strangers; and the interest that *Isaac* had in the power cannot be transferred to them, so as to give them an interest coupled with the power. As *Kidd* conveyed to *Cobb*, before the execution of the power, by the release to *Isaac Bogart*, the deed to *Cobb* revoked and superseded the *power. This is my view of the case. My brethren who agree in the result, consider this as an unexecuted authority; that the reversionary interest, after the deed from *Kidd* to *Bogart* resided in the former; that nothing restrained him from parting with that interest prior to the execution of the power by *H. & J. Bogart*, or one of them, and that, therefore, *Cobb*, being a *bona fide* purchaser, without notice, took the reversionary right of *Kidd*, and became seised of the legal estate, after the termination of *Isaac Bogart's* life estate in the premises.

The plaintiff's counsel have pressed upon the court the case of *Fisher v. Fields*, (10 Johns. Rep. 495.) as deciding this cause. That case was decided on an appeal from the Court of Chancery, on the ground that the assignment to *Birch* passed the equitable interest of the soldier, and amounted to a declaration of trust; that after the patent issued, the soldier took as a trustee for *Birch*; and *Fields* having afterwards purchased of the soldier, with knowledge of the transfer to *Birch*, was a purchaser chargeable with the trust, and was

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as much bound to execute the trust as the soldier himself. The doctrine of that case would prevail, if the cause now pending was in a court of equity, and it could be shown, as it has not been done in this case, that *Cobb* had any notice, when he purchased, of the conveyance to *Isaac Bogart* by *Kidd*, and that the defendant had, also, notice of that conveyance when he purchased. At law, the legal title must prevail; but, on the facts in this case, tested by the decision in *Fisher v. Fields*, even in a court of equity, the plaintiff could not prevail, without proving notice of the conveyance to *Isaac Bogart*, both to *Cobb* and the defendant. This suit was brought before the termination of the life estate; and it appears by the plaintiff's own showing, not only that his estate is ended, but that the defendant has the reversionary interest. The plaintiff, then, has no title to turn the defendant out of possession; but he has a title to the mesne profits and the costs of this suit, and must, therefore, have judgment, to enable him to recover them.

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This gives rise to the question of adverse possession; and without going minutely into an examination of the facts, we are of the opinion that to render a possession *hostile and adverse to the true owner, it must be under color or claim of title; that, in the present case, it was not satisfactorily shown that the possession was adverse, until a lease was taken of *Cobb*, which was within twenty years before the commencement of this action, and that, consequently, the plaintiff was not barred of his entry. There must be a judgment for the plaintiff, with a perpetual stay of the writ of possession. (a)

(a) Vide *Jackson*, ex dem. *Henderson*, v. *Davenport*, 20 *Johns. Rep.* 537, in error.

WOODWORTH, J., dissented, on the ground, that a power from *Kidd*, the soldier, to *Isaac Bogart*, was coupled with an interest. He said, that it was manifest from the words of the instrument, that it was intended to convey all the interest *Kidd* had in the lands; but as the legal title had not then vested, and the transfer could only be of an equity, a power was inserted, authorizing *Henry I. Bogart* to convey to *Isaac Bogart*. The legal operation of this power he considered the same as if authority to convey had been given to *Isaac Bogart*; that it was to every beneficial purpose such a power; it was to be exercised for his benefit, was under his control, and came within the spirit of the rule laid down in 1 *Caines's Cases in Error*, 15. "That when power is given to a person, who derives under the instrument creating the power, a present or future interest, it is, then, a power coupled with an interest." The power, in this case, was well executed, and enured to the benefit of the lessor of the plaintiff, who became seised of an estate in fee, and was entitled to recover.

Judgment for the plaintiff, with a perpetual stay of the writ of possession.

END OF AUGUST TERM.

CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN OCTOBER TERM, 1820,(a) IN THE FORTY-FIFTH YEAR OF OUR
INDEPENDENCE.

Bank of the UNITED STATES *against* JENKINS and others. *Monday, October 16th.*

ONE of the defendants, *Thomas Jenkins*, was arrested on a *capias ad respondendum*, issued in this cause at the suit of the plaintiffs, in the city of *New-York*, and *Elisha Jenkins* and the other defendant were arrested in the county of *Columbia*, and the same person was bail for all the defendants. A judgment having been entered up against all the defendants, a *fi. fa.* was issued against them, in *August* term last, directed to the sheriff of the city and county of *New-York*, who returned thereon, that no goods or chattels, lands or tenements, could be found, &c. A *test. ca. sa.* was, therefore, *directed to the sheriff of the county of *Oneida*, on which *Elisha Jenkins*, who happened then to be in that county, was arrested and imprisoned.

Where several defendants are arrested on a *capias ad respondendum*, at the suit of the plaintiff in several counties, and all put in special bail; and the plaintiff issues a *fi. fa.* against all the defendants to the sheriff of

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the county, in which one of them only was arrested, which is returned *nul. bona*, &c. and, thereupon, issues a *test. ca. sa.* against the defendants, directed to the sheriff of a different county, in which none of the defendants were arrested; and one of the defendants, who was arrested in another county into which no

Sill now moved, that the *test. ca. sa.* be set aside, on the ground, that no *fi. fa.* had been previously issued into the county of *Columbia*, where *Elisha Jenkins* was arrested on the *meane* process. By the seventh section of the *act concerning judgments and executions*, (1 N. R. L. 500. sess. 36. ch. 50. 2 Rev. Stat. 363. § 4.) it is provided, "that no execution shall issue upon any judgment, &c. in any action in which special bail shall have been filed, against the body of any defendant,

(a) By an act of the last session of the legislature, (ch. 216.) the *October term* of this court was directed to be held at *Utica*, in the county of *Oneida*, instead of the city of *New-York*.

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fi. fa. had been issued, is there taken on the *ca. sa.*, it is irregular, not being pursuant to the provision of the act concerning judgments and executions; (1 N. R. L. 500. sess. 36. ch. 50. s. 7. 2 Rev. Stat. 363. § 4.) and the defendant so taken in execution, may be discharged on motion.

Though this court has power, at common law, to relieve against all illegal imprisonments in civil or criminal cases, yet an *habeas corpus* is not the proper remedy for a defendant imprisoned [* 307]

on an *aca. sa.* so irregularly issued; but the party should apply to the court, on motion and affidavit, for that purpose.

unless he is already in prison on execution, until an execution against the goods and chattels, lands and tenements, of *such* defendant, shall have been issued on such judgment, to the proper officer of the county in which the *capias ad respondendum* in such action was served, and such officer shall have returned thereon, that no goods or chattels, lands or tenements, could be found whereon to levy the whole sum directed to be levied by such execution."

Talcot, contra, contended, that a *fi. facias* having been issued against all the defendants, to the sheriff of the city and county of *New-York*, in which county the *capias ad respondendum* had been served on one of the defendants, and such execution returned, it was a sufficient compliance with the terms of the act, so as to authorize the issuing of a *ca. sa.* against all the defendants. The act speaks of any defendant.

Gold, in reply, said, that by the true construction of the act, the previous *fi. fa.* must be issued to the sheriff of the county in which *such* defendant was arrested; meaning *the* defendant against whom the *ca. sa.* is issued. Now, *Elisha Jenkins* was arrested on the *capias ad respondendum* in the county of *Columbia*, where he resides, and no *fi. fa.* has ever been issued into that county.

Per Curiam. This proviso of the statute was intended to prevent the plaintiff from taking out an execution against **the* body of a defendant who might have property enough to pay the debt. Though the terms of the act may seem to apply only to a single defendant; yet it, no doubt, was intended, and such is the sound construction of the act, to apply also to the case of several defendants. The presumption is, that the party resides in the place where he is arrested, and the defendants, who were arrested in the county of *Columbia*, may have property there enough to satisfy the debt due to the plaintiffs. This construction of the act will produce no delay or injury to a plaintiff, for he may issue writs of *fi. fa.* into as many counties as he pleases, at the same time; but all of them must be returned, before he can be authorized to issue a writ of *ca. sa.* We are of opinion, that the motion ought to be granted; but as the attorney of the plaintiffs would be liable to an action for false imprisonment; and as there might be some doubt as to the meaning of the act, and he may have acted in good faith, we think, that we have a right to impose terms on the defendant; we, therefore, grant the motion, on condition that he stipulates not to bring an action for false imprisonment.

The defendant refusing to enter into such a stipulation, *Gold*, on a subsequent day, applied to the court for the allowance of a *habeas corpus*, saying, that he supposed it to be the

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proper remedy to relieve the defendant from his imprisonment; the writ of *audita querela* being an equitable remedy, applicable rather to the case where the defendant is entitled to relief against the judgment, than to a case of mere irregularity in the issuing of an execution. (2 Saund. 148. n. 1. 1 Comyn's Dig. *Audita Querela*, (A.) 1 Bac. Abr. *Audita Querela*. (A.) (B.)

SPENCER, Ch. J. The court have, no doubt, more extensive powers than a judge in vacation, in regard to writs of *habeas corpus*. We allow the writ, though we do not well see what effect it is to have.

The defendant was, afterwards, on the last day of the term, brought up on the *habeas corpus*, to which the sheriff returned, that he held the defendant in his custody, by virtue of a writ of *test. ca. sa.* issued out of this court, and *directed to him in the above cause. Sill moved, that the defendant be discharged; and stated, that the court had power to examine into facts *dehors* the return. To show this, he read the *preamble* to the "act to amend the act, entitled, an act to prevent unjust imprisonment, by securing the benefit of the writ of *habeas corpus*," passed the 21st of April, 1818, which says, among other things, that "whereas doubts are also entertained whether returns made to writs of *habeas corpus* issued under the said act, are traversable, or examinable by facts *dehors* the return."

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SPENCER, Ch. J. I do not consider that statute as applying to this court in term time. The court have no doubt as to their powers. The only question is, whether the writ of *habeas corpus* is the proper remedy.

Talcot, for the plaintiffs. The proper mode of proceeding on the part of the defendant, to be relieved from this imprisonment, was the one pursued by him on the first day of the term, that is, by *motion*, and which was granted to him, on terms. He has refused to comply with those terms, and now resorts to this writ to avoid the condition which the court thought it right to annex to the order which they granted for his discharge. The defendant, then, stands on his strict rights, and is entitled to no favor. The 20th section of the "act concerning sheriffs, and their duty in respect to process, arrest, and the keeping of prisoners," (1 N. R. L. 418. sess. 36. ch. 67. 2 Rev. Stat. 426.) is expressly applicable to writs of *habeas corpus* returned in term, but not in vacation. It declares, that "if any writ shall be granted, commanding the sheriff or keeper of the prison where any person shall be so charged in execution, for any debt or damages aforesaid, to have the body of such prisoner, with the cause of his imprisonment, in the Chancery or in any other court, or before the chancellor or

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any judge, and it be returned upon the said writ that such prisoner is charged in execution as aforesaid, then and in every such case, such prisoner shall be immediately remanded, and shall remain in prison according to law," &c. In *Cable v. Cooper*, (15 *Johns. Rep.* 152.) *Van Ness*, J., who delivered the opinion of the court, said, that it "might well be doubted, whether the *habeas corpus act*, (1 *N. R. L.* 354, sess. 36. ch. 57. 2 *Rev. Stat.* 563.) gives to a judge or the chancellor in vacation, a right to discharge a party imprisoned on *civil process*. In the case of *Wilson, ex parte*, (6 *Cranch*, 52.) the Supreme Court of the *United States* refused to allow a writ of *habeas corpus*, where the person was in custody on a *ca. sa.*, being of opinion that it was not the proper remedy in a case of arrest under a *civil process*. The truth of the return to a writ of *habeas corpus* is not to be controverted, though the court may examine into the circumstances of a fact, by *affidavit*, in order to determine whether it be reasonable to bail the prisoner or not. (*Hawk. P. C. B.* 2. ch. 15. s. 78, 79.)

Gold said, that the court might look to matters *dehors* the return, and that it was so decided in *Yates's case*. (*Yates v. The People*, 6 *Johns. Rep.* 337.)

SPENCER. Ch. J. This court has power to relieve against all illegal imprisonments, either in civil or criminal cases. It is a power derived from the common law, and I know of no limit to it, but our sound discretion. But we are of opinion, that the writ of *habeas corpus* is not the proper remedy for the defendant in this case, and shall not, therefore, discharge him from imprisonment on this writ. We have again looked into the affidavits on which the motion was made on the first day of the term, and on reconsidering the case, we are satisfied that there was nothing to warrant the practice pursued by the attorney of the plaintiffs; and that it was merely an experiment on their part to get their money, supposing probably, that if the defendant was taken in execution, at so great a distance from his home, he would find some means to satisfy the debt. We, therefore, direct that the rule granted on the first application, be amended, by striking out that part of it, making it a condition of his discharge, that the defendant should stipulate not to bring an action for a false imprisonment. (a)

Rule accordingly.

(a) Vide *Cable v. Cooper*, 15 *Johns. Rep.* 152.

*SIVER *against* SMITH.UTICA,
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THE declaration in this cause contained a single count, to which the defendant pleaded the general issue, and a special plea, and gave notice of a rule that the plaintiff reply, &c. Within twenty days thereafter, the plaintiff delivered to the defendant a declaration which he had amended, by adding a second count, with notice to plead, &c., which amendment had been made without any application to the court. The defendant's attorney, without regarding the second declaration, entered the default of the plaintiff for not replying to the plea to the first declaration.

E. Williams, for the plaintiff, moved to set aside the default

Starkweather, contra.

Per Curiam. The plaintiff cannot amend his declaration as of course, by adding a new count; nor can the defendant amend his plea of course, by adding a new plea. It can only be done by leave of the court, on special application for that purpose. On this ground, the motion ought to be denied; but as there appears to have been a mistake on the part of the plaintiff's attorney, as to the practice, we grant the rule, on payment of costs. (a)

(a) Vide *Squires v. Mallory*, 17 Johns. Rep. 3.

JACKSON, *ex. dem.* BURNETT, v. KELLER.

THERE were fourteen causes at the suit of the same lessor of the plaintiff. A motion had been made, grounded on an affidavit and notice, in which the titles of all the causes were included together. A question was now raised whether *the plaintiff's attorney, his motion having been granted, could have costs taxed in each of the causes.

Throop, for the plaintiff.

Sill, contra.

Per Curiam. Where there are several causes depending, which are included together, on the same paper, in one affidavit and notice, there can be but one bill of costs. Here are fourteen causes, all entitled in one affidavit; and the party is

Where there are several suits depending between the same

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parties, and which are included together on the same paper, in one affidavit and notice of a motion, only one bill of costs is allowed to be taxed, on the motion being granted.

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never allowed to make out and have taxed, a separate bill of cost in each cause. (a)

(a) Vide *Jackson v. Clark*, 4 *Conn. Rep.* 532. *Jackson v. Garnsey*, 3 *Ibid.* 335.
Boice v. Thompson, 20 *Johas. Rep.* 274.

LAMBERT and others against J. PAULDING.

W. PAULDING against the same.

The goods of the debtor are bound by the delivery of the execution to the sheriff, and the creditor in the execution acquires a lien of which he cannot be deprived by the act of the debtor; and if the goods, before an actual levy and sale, are removed by the debtor out of the bailiwick of the sheriff, into another county, and are there taken and sold under an exe-

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cution subsequently issued, though the *bona fide* purchaser, at such sale, acquires a valid title to the goods, yet the proceeds of such sale in the hands of the sheriff will be ordered to be paid to the plaintiff in the first execution, to the amount of his debt, leaving the residue, if any, for the plaintiff in the second execution. (a)

CALVES, for the plaintiffs in the first cause, moved that the sheriff of the county of *Westchester* do pay to the plaintiffs in the first suit above-mentioned, or to their attorney, out of the moneys in his hands, arising from the sale of the sloop *Euphemia*, on the executions in the above causes, the amount of the execution in the first cause. From the affidavits which were read, it appeared, that on the 11th of *August* last, a judgment was entered up against the defendant, at the suit of the plaintiffs in the first cause, and on the 12th of *August*, a *fieri facias* was issued thereon, directed to the sheriff of the city and county of *New-York*, with directions to levy on the sloop *Euphemia*, belonging to the defendant, then lying in the city; but no actual levy was made. On *Monday*, the 14th of *August*, the defendant being told by his attorney that there would probably be a judgment entered up against him at the suit of *Lambert* and others, on the 15th of *August*, confessed a judgment in favor of the plaintiff, *(*W. P.*) in the second cause, on a bond dated the 1st of *July*, 1814, conditioned for the payment of 7,370 dollars. The judgment roll was filed in the clerk's office, at two o'clock, P. M., and an execution issued thereon to the sheriff of *New-York*; but the plaintiff's attorney then learning for the first time, that a judgment had been actually entered up in the first cause, and an execution issued thereon to the sheriff of *New-York*, countermanded his execution on the same day, and issued a *test. fi. fa.* to the sheriff of *Westchester*, which was delivered to his deputy, on the morning of the 15th of *August*. It appeared that the defendant, on the morning of the 14th of *August*, removed the sloop from *New-York* to *Tarrytown*, in the county of *Westchester*; and the sheriff of that county there seized and sold the vessel, under the *test. fi. fa.* so delivered to him in the second suit; but the money arising from the sale, being 1,800 dollars, was retained in his hands, by an order of the recorder of the city of *New-York*, until an application should be made to this court. On the 19th of *August*, a *test. fi. fa.* in the first suit, was delivered to the sheriff of *Westchester*.

(a) Vide post, *Beale v. Allen*, 363. *Lemon v. Staats*, 1 *Cowen's Rep.* 592. *Wells v. Marshall*, 4 *Conn. Rep.* 411. *Marsh v. Lawrence*, *Ibid.* 464.

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Caines, in support of the motion, said, that he did not intend to deny the common law right of a debtor, to prefer one creditor to another, nor that a judgment confessed for a *bona fide* debt, in favor of one creditor, during the pendency of a suit by another, might gain a legal priority over the judgment subsequently recovered, though confessed with a view to such priority; but, he said, to warrant that priority, the execution on the judgment confessed must be delivered to the sheriff before the execution sued out on the judgment recovered. Such was the case of *Holbird v. Anderson*, (5 Term Rep. 235.) inaccurately stated by Mr. *Tidd*, in which the execution on the judgment confessed, was in the sheriff's hands two hours before the execution on the judgment recovered. The reverse was the fact in the case now before the court. The rule, therefore, *qui prior in tempore, potior in jure*, would govern the rights of the plaintiffs in the respective suits.

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**Talcot*, contra, for the plaintiff, *Paulding*. By the statute (sess. 36. ch. 5. s. 6. 1 N. R. L. 501, 502.) no execution binds the goods of the defendant, until such execution is delivered to the sheriff, or other officer, to be executed. The provision of the statute prevents the debtor from making any sale of the property; but if the goods remain in the possession of the debtor, without having been levied on by the sheriff, on the execution in his hands, they may be levied on and disposed of, by virtue of any other execution, for a *bona fide* debt, though subsequently issued; and the purchaser under such subsequent execution will hold the property. Under this statute, it has been held, "that neither before nor since the statute of frauds, is the property of the goods altered, but remains in the defendant until execution executed:" (2 Equ. Cas. Abr. 381. per Lord *Hardwicke*, *Hotchkiss v. M'Vickar*, per *Spencer*, J. 12 Johns. Rep. 403. 407.) and the meaning of the words, "that the goods shall be bound from the delivery of the writ to the sheriff," is, that after the writ is so delivered, if the defendant makes any assignment of his goods, *except in market overt*, or by becoming a bankrupt, which is an assignment in law, the sheriff may take them in execution. If two writs of execution be delivered to the sheriff on different days, and the sheriff executes the last writ first, by making sale of the goods, the sale will stand good, and the plaintiff who delivered the execution first to the sheriff, may have his remedy against him. (*Carthew*, 420. *Sanford v. Roosa*, 12 Johns. Rep. 162. 2 Salk. 320. 1 Term Rep. 729. 1 Lord Raym. 252. 2 Ventris, 218. 3 Lev. 69. 191. Lord Raym. 724.) Though a *fi. fa.* binds the goods, as against the defendant, yet the property remains in him, until execution executed; and, therefore, a sale under a subsequent execution vests a title in the purchaser; and the plaintiff in the first execution is left to his remedy against the sheriff, unless there has been some fault or *laches*

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on his part. (*Payne v. Drew*, 4 *East*, 523.) The cases referred to, show, that the property of a defendant is not so completely bound, by the delivery of an execution to the sheriff, but that the former has some control over it, until *execution executed*, or until it is levied upon and sold under an execution subsequently issued, or is transferred by the operation of a *bankrupt law. The defendant, then in this case, had a right to remove his property before execution executed. It does not appear that when he removed his vessel to *T.* that he knew that an execution had been issued against him; though he expected that there would be such an execution the next day. Even if he had known of the execution being in the hands of the sheriff, he had a right to remove his property beyond its reach, before any levy was actually made.

Again; a debtor has a right to prefer one creditor to another, and confess a judgment for a *bona fide* debt due, without its being deemed fraudulent, there being no bankrupt law to prevent it. (5 *Term Rep.* 235. 420. 425. *Rob. on Fraud. Conv.* 491. (a) Indeed, it is not pretended that *W. Paulding's* judgment was not for a just debt then due.

Again; the judgment of *Lambert and others*, was entered up on the 11th of *August*, being the *quarto die post* of the *August* term, as a final judgment; but if, as is the opinion of many of the bar, the rule for judgment should have been *nisi*, final judgment could not have been entered regularly, until the 15th of *August*.

Caines, in reply, said, that he did not deny the law of the cases which had been cited; but the present case was easily to be distinguished from them, by considering the parties against whom the applications were made in the cases relied on. They were either *bona fide* purchasers, and the attempt was to take from them what they had honestly purchased and paid for, or sheriffs who were to be made to pay another's debt. The contest here is between two incumbrancers on the same subject matter. The *lien* acquired by the first, could not be impaired by any act of the second, either by himself, or jointly with the owner of the chattel. When the *Lamberts* lodged their writ with the sheriff, they acquired a *lien* on the vessel; and when the writ of *W. P.* was delivered to the sheriff, he, or his attorney, knew of the previous *lien* of the *Lamberts*. The subsequent sale of the *sheriff of *Westchester*, on the *test. fi. fa.* of *W. P.* was subject to the *lien* of the execution of the *Lamberts*. By granting this motion, the property in the vessel acquired by the purchaser, under the sheriff's sale, will remain undisturbed. The purchaser keeps what he has bought; but the proceeds in the hands of the sheriff are subject to the *lien* of the first execution of the *Lamberts*. *W. P.*,

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(a) Vide *Pickstock v. Lyster*, 3 *Maule & Selwyn*, 371. 4 *East Rep.* 1. *Jackson v. Brownell*, 3 *Caines*, 222. 5 *Johns. Rep.* 335. 412. 3 *Johns. Rep.* 71.

in selling, acted for the *Lamberts*, to the amount of their prior *lien*. and for himself as to the residue. The property passed and continued in the vendee. From these facts, and the consequences to be deduced from them, it is evident, that the granting of this motion will leave the principles of the cases cited untouched, and be perfectly consistent with them.

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Per Curiam. The delivery of the *fi. fa.* in the suit of *Lambert* and others, against the defendant, to the sheriff of the city and county of *New-York*, bound the goods of the defendant, then in his bailiwick; and the plaintiffs, in that execution, cannot be deprived of the *lien* on the sloop, which was then lying in *New-York*, by the act of the defendant, in removing the vessel into another county. He would be liable to an action, at the suit of the sheriff, for so removing the property. We therefore grant a rule that the sheriff of *Westchester* pay over to the plaintiff in the first suit, the 1,800 dollars, the proceeds of the sale of the sloop *Euphemia*, remaining in his hands. (a)

Motion granted.

(a) Vide 2 *Rev. Stat.* 366. § 14.

BANK OF AMERICA against WOODWORTH.

ASSUMPSIT on a promissory note, dated *Albany*, April 17th, 1817, for 2,500 dollars, made by *James Kane*, payable sixty days after date, to the defendant or his order, endorsed by him, and by *John Kane*, to the plaintiffs. In the margin of the note were written the following words: "Payable at the *Bank of America*, *James Kane*." The cause was tried in December, 1818, before the chief justice. The plaintiffs proved the making of the note, and the endorsement by the defendant, that payment was demanded at the *Bank of America* on the 19th of June, 1818, which was refused, and that notice of non-payment was regularly given to the defendant, who resided in *Albany*, by a letter to him, sent by the first post thereafter. The defendant's counsel insisted, that the plaintiffs had not made out their case; that they ought to have proved, in the first instance, that the memorandum in the margin of the note, was made before it was endorsed by the defendant, as it formed no part of the contract. The chief justice inclined to the opinion that the presumption of law was, that the memorandum was made prior to the endorsement. The defendant then called *James Kane*, the maker of the note, as a witness, who was objected to, but the objection was overruled. The witness testified, that the note was made and endorsed for his accom-

After a note was made and endorsed, the maker, without the knowledge or consent of the endorser, (both of whom resided in *Albany*, where the note was made,) added in the margin, "payable at the bank of *America*," and payment was demanded at that bank, in the city of *New-York*, and due notice of non-payment sent by post to the endorser, in *Albany*: Held, that the addition of the place of payment was an immaterial alteration, and that the demand

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and notice were
sufficient to
charge the en-
dorsor. (a)

(a) Vide *Wood-
worth v. Bank
of America*, 19
Johns. Rep. 391,
where the judg-
ment in this case
was reversed.

modation; that after the defendant had endorsed the note and after it was delivered to the witness, he made and subscribed the memorandum in the margin of the note, without the knowledge or consent of the defendant: That the witness then resided, and has continued to reside ever since, in *Albany*; that after the endorsement of the note by the defendant and by *John Kane*, it was discounted by the plaintiffs, for the use and benefit of the witness.

A verdict was taken for the plaintiffs, by consent, subject to the opinion of the court on the above case, with leave to either party to turn the same into a special verdict.

Hoffman, for the plaintiffs. 1. The note was not made payable at any particular place. A demand of payment, therefore, of the defendant personally, or at such place as he should appoint for that purpose, was sufficient. (*Thompson v. Ketchum*, 4 *Johns. Rep.* 235. *Anderson v. Drake*, 14 *Johns. Rep.* 114.) The maker of a note is liable every where.

*2. It is competent to the maker of a note to appoint a place of payment, and a demand at such place is sufficient to charge the endorser. (*Saunders and others v. Judge*, 2 *Hen. Bl.* 509.) In the case of the *State Bank v. Hurd*, (12 *Tyng's Mass. Rep.* 172.) where the maker had, after the note was made, directed that the bank notice should be left for him at a particular place, the Supreme Court of *Massachusetts* were of opinion, that this was equivalent to a more formal demand, and dispensed with the necessity of making a demand at his house or usual place of business. A personal demand of payment, where no place is fixed in the note for that purpose, is always sufficient. It is, then, in the power of the maker, by changing the place of his residence, before the note falls due, to fix a place of demand different from that in which he resided when it was made. *A fortiori*, he may, by special agreement, appoint the place of payment. The endorser of a note is like the drawer of a bill of exchange, and the maker like the acceptor of a bill; (*Chitty on Bills*, 238. 2d ed.) and this resemblance being fixed, the law is the same in regard to both. Now, it is the common practice of merchants to accept bills payable at a particular place; and such acceptances have been held valid, though the courts in *England* have differed in their opinion as to the effect of such a qualified acceptance. (a.) (*Gammon v. Schmoll*, 5 *Taunt.* 344. *Lyon v. Sundius*, 1 *Campb. N. P. Rep.* 424. *Head v. Sewell*, 1 *Holt N. P. Rep.* 363. *Price v. Mitchell*, 4 *Campb. N. P. Rep.* 200.)

3. Adding the place of payment by the maker, after the note was endorsed, was not a material alteration, nor did it vary the responsibility of the parties. (*Bayley on Bills*, 43 44. *Smith v. Abbot, Str.* 1152. 2 *Wils.* 9. *Trapp v. Spear*

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(a) Vide 17 *Johns. Rep.* 248. 257. note

man, 3 Esp. N. P. Rep. 57. 1 Campb. N. P. Rep. 82. note.) In *Marter v. Miller*, (4 Term Rep. 320.) the date of the bill was altered, after it had been accepted, so as to accelerate the day of payment, and the alteration was, therefore, held material. Where a blank note is endorsed, and the blanks are, afterwards, filled up by the holder, the note is considered valid and binding on the endorser. (*Russell v. Langstaff*, Doug. 514.)

*4. *James Kane*, being the maker of the note, was not a competent witness. (*Skidding v. Warren*, 15 Johns. Rep. 270. *Hubbly v. Brown*, 16 Johns. Rep. 70.)

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T. A. Emmet, contra, contended, that this case was distinguishable from any of the cases which had been cited. The defendant had no notice of any addition to the note, or of its alteration. (*Chitty on Bills*, 118, 119. 3 Esp. N. P. Rep. 57.) The undertaking of an endorser is conditional; it is, that he will pay the note, if the maker does not pay it, after a proper demand of him, according to its tenor, and due notice is given to the endorser of the default of the maker. The engagement of the endorser must always be in reference to the condition of the note at the time of the endorsement. If a note is not made payable at a particular place, the holder must use due diligence to find the maker, and if he has removed to another place, he must demand payment of him there; but where the place of payment is fixed, the demand of payment need not be made elsewhere. (14 Johns. Rep. 114. 6 Mass. Rep. 524.) So, the undertaking of the endorser must vary with the fact of the note being payable, or not, at a particular place. The demand of the maker, according to the terms of the note, is a condition precedent to the liability of the endorser, who has a right to insist that the demand should be made of the maker according to the tenor of the note. If, therefore, the contract is varied, without the knowledge or consent of the collateral promiser, he is discharged. The undertaking of the defendant was to be responsible, if a demand of payment was made of the maker in *Albany*, his place of residence. This being an accommodation note, can make no difference. In *Saunderson v. Judge*, (2 H. Bl. 509.) the memorandum at the foot of the note was made by the maker, before the note was negotiated. So in the case of the *State Bank v. Hurd*, both the maker and endorser gave directions as to the place where the notices were to be left. Suppose the maker, after the note has been endorsed, without the knowledge or consent of the endorser, should appoint *Philadelphia* or *Charleston*, as the place where payment was to be demanded, a much longer time must elapse before the endorser here could receive notice of non-payment, and his security *may be greatly diminished. If the maker is allowed to add one place of payment different from that in which he

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resides, or in which the note is dated, he may assign any place, nowever remote, for that purpose. The endorser, calculating on the place of payment to be that of the maker's residence, may suffer the means of indemnity to pass from his hands, supposing, from the lapse of time since the note was due, that it has been regularly paid. In *Outhwaite v. Luntley*, (4 *Campb. N. P. Rep.* 179.) after a bill had been drawn and endorsed, and left for acceptance, the date was altered from the 5th to the 15th of *March*, without the consent of the drawers. Lord *Ellenborough*, who held it to be void, observed, that "it is impossible to say that postponing the time of payment is always advantageous to the parties liable on the bill. Without my knowing it, I may be out of *England* at the time when the bill I drew becomes dishonored, and thus, having made no provision for it, from the belief that it was duly honored some time before, this postponement may cause the ruin of my credit." So, in the present case, the endorser may suppose the note paid, as the maker lived in *Albany*, and he had received no notice of its being dishonored, after the time of payment had elapsed; but if he is to be made liable on a notice of non-payment arriving from *Charleston* or *New-Orleans*, two months after, he may be ruined.

Wells, in reply. The memorandum, in the margin of the note, was merely to give information where the maker was to be found. It formed no part of the contract. Whatever difference of opinion may exist among the judges of the different courts in *England*, it is the decision of this court, in the case of *Wolcott v. Van Santvoord*, that the designation of the place of payment makes no part of the contract, at least, as between the immediate parties, as the holder and maker, or the acceptor. But it is said, that putting this memorandum on the note after it was endorsed, rendered it void, as regards the defendant; but the note cannot be good as to the maker, and void as to the endorser. An alteration in a material part vitiates it entirely, as to every person. *Chitty*, in stating what alterations are material, puts, by way of example, *this very case, the insertion of a place of payment, as an instance of an immaterial alteration, which did not affect the validity of the bill or note. (*Chitty on Bills*, 118, 119. 3 *Esp. N. P. Rep.* 57. 4 *Term Rep.* 320. *Marson v. Pettit*, 1 *Campb. N. P. Rep.* 82. n. 2 *Starkie's Rep.* 45.) The case of *Outhwaite v. Luntley* was that of a material alteration in the date of the bill; and the observation of Lord *E.* must be taken in reference to that fact. The case of *Anderson v. Drake* does not support the proposition that the undertaking of the endorser is merely collateral, and that he will pay, if the maker does not, on demand at his place of residence. *Thompson*, Ch. J., observes only, that the presumption is, that the note is payable where it is dated; and that presumption was rebutted, by proof tha

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the maker, in fact, resided elsewhere. A demand of payment may be made of the maker personally, or at his place of residence, or at a place designated by him, for that purpose. The maker may dispense with a personal demand. This doctrine was laid down in *Saunderson v. Judge*, and recognized by this court in *Anderson v. Drake*. In *Parker v. Gordon*, (7 East, 385.) it was decided, that to lay the foundation for an action against the acceptor, the demand of payment must be made at the place designated by the acceptor. Now, if the acceptor of a bill can, by his own act, designate the place of payment, why may not the maker of a note? The endorser's undertaking is equally collateral in the one case as in the other. It is begging the question, to say that the endorser's engagement is only to pay, in case the maker does not, after a demand at his place of residence. The undertaking is much broader; it is that he will pay, in case of non-payment by the maker, after a demand of him personally, or at the place he may appoint for that purpose. In the case in 12 Mass. Rep. the maker did fix the place of payment, without the assent of the endorser. The words of the reporter are, that "notices, &c. were left for the promiser, and for the defendant as endorser, at one *Metcalf's* shop, in *Cornhill, Boston*, by direction of the said *L. & H. respectively*." Suppose that there had been no place designated by the maker, in the present case, and he had come to *New-York*, *on the day of payment, and the holder had made a personal demand of him, and he had refused payment, would not that have been sufficient to charge the endorser, on due notice to him? If this doctrine produces any inconvenience to the endorser, it results necessarily from the contract to which he has given his consent. To hold that a maker or acceptor, after a bill or note is endorsed, cannot designate a place of payment, would greatly impede the negotiability of these instruments.

Again; the maker of the note, on the ground of interest, as well as principles of public policy, ought not to have been admitted as a witness. (*Powell v. Waters*, 17 Johns. Rep. 176. 10 Johns. Rep. 23. 15 Johns. Rep. 270. 16 Johns. Rep. 70.)

SPENCER, Ch. J., delivered the opinion of the court. (After stating the facts.) The question made upon the argument is, whether, under these facts, a demand of payment at the bank of *America* was sufficient? On the part of the defendant, it was contended, that a personal demand of the maker at his residence, or place of business in *Albany*, was necessary; that it was not competent to the maker, by any act of his, to alter the place of payment; and there having been no personal demand, nor any demand at the residence or place of business of the maker in *Albany*, the endorser was discharged. When the note was endorsed by the defendant, it was not payable at any place. Had not the memorandum been made, and had the

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residence of the maker continued to be in *Albany*, and if he himself had been in *Albany* on the day the note fell due, undoubtedly, the demand must have been made of the maker, either personally, or at his place of business in *Albany*, to charge the endorser. If, however, the maker had changed his residence before the note fell due, or if he had been met with in *New-York*, or elsewhere, when the note fell due, a personal demand upon him would have been regular, and sufficient to fix the endorsers. It cannot be said, then, that it was any part of the contract, as between the immediate parties to the note, that demand should be made of the maker in *Albany*, or that the endorsers relied upon the necessity *of such a demand, or that the note was endorsed in the confidence or expectation that a demand of payment was to be made only in *Albany*. In *Anderson v. Drake*, (14 *Johns. Rep.* 114.) it was decided, that a bill or note is not payable where it is dated, but that where no place is appointed in the note itself, it must be demanded at the known permanent residence of the maker. In that case, when the note was given, the maker resided in *New-York*, and before it fell due he removed to *Kingston*, which fact being known to the holder when the note fell due, we held, that payment ought to have been demanded of him at *Kingston*. In *Wolcott v. Van Santvoord*, (17 *Johns. Rep.* 248.) it was decided, that the time and place of payment formed no essential part of the contract, as between the immediate parties to a note or bill, although, as regards the endorser, and to charge him, it is necessary to use due diligence, by demanding payment of the maker or acceptor, on the day the note or bill falls due, and giving notice on that, or the subsequent day, to the endorser. The note being silent as to the place of payment, is it not competent to the maker to designate a place where payment shall be made? And if so, will not a demand at such place be sufficient, and dispense with the necessity of a personal demand?

The case of *Saunderson and others v. Judge*, (2 *H. Bl.* 509.) seems to me to be very much in point on this part of the case. The action was on a note by the last endorsee against the second endorsee, and one of the questions was, whether a regular demand of payment had been made upon *Sharp*, the maker of the note. At the foot of the note was a memorandum by *Sharp*, that he would pay it at the house of *Saunderson & Co.*, the plaintiffs in the suit. Some time before the note fell due, *Sharp* absconded, and there was no demand on him. The court decided, that it was no part of the contract that the note should be paid at the house of *Saunderson & Co.*, and, therefore, it need not be stated in the declaration; that the maker had merely appointed the house of his banker as the place where he was to be called upon for payment, and when it would be paid; yet this was both an undertaking that there should be cash there, and also an order to the banker to
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pay it; that it was not necessary a demand *should be personal; it was sufficient if it be made at the house of the maker of the note, and it was the same thing, in effect, if it be made at the place where he appoints it to be made; that if *Judge* had been the holder of the note, it would have been enough for him to have presented it for payment at the house of *Saunderson & Co.*; and as they at whose house it was to be paid, were themselves the holders of it, it was a sufficient demand, for them to turn to their books and see the maker's account with them, and a sufficient refusal, to find that he had no effects in their hands. In *Price v. Mitchell*, (4 *Camp. N. P. Rep.* 200.) the action was brought by the endorser against the maker of a promissory note, at the foot of which were these words: "at Messrs. *Veres, Smart & Co.* 77 *Lombard-street, London.*" It was contended for the defendant, that the note when due ought to have been presented for payment, at Messrs. *Veres, Smart & Co.* *Gibbs*, Chief Justice, was of opinion, that the words at the foot of the note were only a memorandum *where payment might be demanded*. He observed, that had they been inserted in the body of the note, they would have formed a part of the contract, and a presentment there would have been necessary; and he referred to the last edition of *Bailey*, (96.) where it is said, "if a note be made payable at a particular place, and the place be mentioned in the body of the note, presentment for payment must be made at that place; but where the place is mentioned in the margin, it does not appear that such presentment is necessary." Chief Justice *Gibbs* added, that when the direction to the place of payment is mentioned in the margin, or at the foot of the note, as in that case, the inspection and perusal of the instrument show that it was not intended to be any condition to the absolute promise to pay in the body of the note. In *Trapp v. Spearman*, (3 *Esp. Rep.* 57.) in assumpsit by the endorser against the acceptor, the defence set up was, that the bill of exchange had been altered after it was given. The alteration was, "when due, at the *Cross Keys, Black Friars Road.*" Lord *Kenyon* said, it was not an alteration, either in the time of payment or in the sum; that to make a bill void by reason of an alteration, it should be in a material part. Though it had been formerly holden, that even *telling up a sum on a bill, or writing any thing on it, would invalidate it, that strictness was now exploded; and as the alteration in that case was not in a material point, but only designating the place where the bill would be paid, it was not such an alteration as should invalidate the bill.

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The analogy between bills of exchange and promissory notes becomes perfect, the moment a negotiable note is endorsed. The maker of the note is to be regarded in the same light as the acceptor of a bill. Now, nothing is more common among merchants, in *England*, than for the acceptor of a bill, payable in a given number of days, or in so many days

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after sight, to accept the bill payable at a banker's; the bill itself being silent as to the place of payment. And it has uniformly been held, that a presentment of the bill at the place appointed by the acceptor for payment, is sufficient, and dispenses with the necessity of a personal demand. In *Parker v. Gordon*, (7 East, 385.) the bill of exchange had been accepted, payable at *Davison & Co's.* who were the acceptor's bankers in *London*. A question arose, whether the bill had been presented at the banker's in due season, on the day it was payable. Lord *Ellenborough* said, the person on whom the bill was drawn, accepted it payable at *Davison & Co's.* who were his bankers, for the purpose of facilitating the payment, and if it were refused payment there, on due presentment, it would be a sufficient dishonor of the bill whereon to charge the drawer. *Lawrence*, Justice, said, the party might have refused to take the special acceptance; but if he chooses to take the acceptance in that manner, payable at the banker's, does he not agree to take it payable at the usual banking hours? That when a bill is accepted in this manner, it must be understood by all parties concerned, that it is to be presented for payment at the banker's, within the usual hours of business. *Le Blanc*, Justice, expressed himself to the same effect. The Courts of King's Bench and Common Pleas are at variance on the question, whether if a bill of exchange be accepted payable at a particular place, it is necessary, in an action against the acceptor, to aver a presentment of the bill at such place. Lord *Ellenborough*, in *Lyon v. Sundius and Sheriff*, (1 Camp. 424.) held, that such acceptance formed no part of the contract, and *said, that the judges were all of that opinion. In *Heard v. Sewell*, (1 Holt's N. P. Rep. 363.) Chief Justice *Gibbs* persisted in the same opinion. On the ground, then, that the memorandum in the margin of the note in this case, did not alter the contract, as between the immediate parties to the note; as it was an appointment of the place where the maker would pay the note; and, as I think, upon authority that has not been and cannot be shaken, the maker had a right to make such appointment, a demand of payment at the bank of *America* was sufficient. Notice having been regularly given of the dishonor of the bill at such place, the defendant is liable.

It has been urged, that in *Saunderson and others v. Judge*, the memorandum at the foot of the note, designating the place of payment, was made before the note was negotiated, and that therein consists the material difference between that case and this. It may be, that the memorandum in that case was made before the negotiation of the note; but if it formed no part of the contract, in this case, that the note should be paid at the bank of *America*, the time when the memorandum was made is immaterial. It was a mere appointment of the place where the maker was to be called on for payment, and where it would be paid, and this the maker could do without reference

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to the endorsers. It was a circumstance within his control, and under his direction. We have seen, that if the maker of the note had removed to *New-York*, demand must have been made upon him there, had no place of payment been mentioned in the note, and if the maker had appointed no place of payment. So, also, if the maker had gone on a visit to *New-York*, or if he had gone there expressly for the purpose of having a demand made upon him there, a personal demand upon him in *New-York*, and a neglect to pay, would have been a dishonor of the bill, and rendered the endorser liable, on due notice to him. It was, then, a matter of entire volition on the part of *Kane*, where the demand should be made, and, as was well observed on the argument, the maker of the note could do by agreement, whatever he could do by his locomotive powers. The defendant having endorsed the note, without any restraint upon the maker, as to the *place of payment, he must be deemed to have left that circumstance to the discretion and control of the maker. In the parallel case of a bill of exchange, payable generally, as well may the drawer object, that the acceptor having qualified his acceptance by making the bill payable at a banker's in *London*, when the drawer and acceptor both resided in *Liverpool*, that the nature of the contract is altered; yet we see that nothing is more usual, and that it is perfectly settled, that a demand at such banker's is a sufficient demand.

It has been insisted, that if the maker of a note endorsed gratuitously, and for his accommodation, can appoint the place of payment, it puts it in his power, by appointing a distant place of payment, to increase the risk and responsibility of the endorser, without his assent, and contrary to his understanding of his engagement. In the first place, this can be guarded against, by inserting a place of payment in the note itself; and, in the next place, if the maker should appoint a place of payment so distant and remote as to impose an unreasonable risk on the endorser, it might be considered a fraud upon him. When such a case arises, it will deserve serious consideration, whether the endorser can be rendered liable. In the present case, it is not pretended that the defendant has been injured by the maker's appointing the place of payment; and the notice of the non-payment of the note was given within two or three days after it was dishonored. In any light in which I have been able to place the question, I cannot doubt of the defendant's liability; and this is the opinion, also, of my brethren.

Judgment for the plaintiff.

WOODWORTH, J., being a party, did not, of course, sit in the cause.

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*STAFFORD against J. V. N. YATES.

Any person who is a party to a note or bill, may give notice of its dishonor to the other parties; and a notice, given by the holder to the several endorsers, enures to the benefit of the endorsees, or preceding parties. So, that the first endorser of a note who has received notice of its non-payment from the holder, but not from the second or subsequent endorser, is liable to such subsequent endorser in the same manner as if the notice had been received from him. (a)

Though the last endorser delays, for more than a year, to take up the note, and bring his action against a prior endorser, who has received notice of non-payment from the holder, the [* 328] delay does not affect his right of action against the first endorser.

ASSUMPSIT on a promissory note, dated *Albany, October 1st, 1818*, made by *Sebastian Visscher*, for 300 dollars, payable to the defendant, or his order, sixty-two days after date, at the *Mechanics' and Farmers' bank*, endorsed by the defendant, to the plaintiff. The cause was tried at the *Albany circuit*, in *October, 1819*, before Mr. Justice *Van Ness*.

It appeared, that the note, endorsed by the defendant, and by the plaintiff, as second endorser, was discounted at the bank, where it was made payable, for the accommodation of the maker. The note was protested for non-payment on the 5th of *December*, and due notice of the demand, and non-payment, given by the notary of the bank, in the evening of the same day, to both of the endorsers. On the 24th of *February, 1819*, the plaintiff went to the bank, where the note remained, took it up, and having erased his name as second endorser, afterwards brought his action against the defendant, as first endorser.

At the trial, after the plaintiff had proved the facts above stated, the defendant's counsel objected, that the evidence was not sufficient to support the action, on the ground, that the plaintiff had not proved a notice from himself, as second endorser, to the defendant, as first endorser, according to the averment in the declaration, and had so long delayed taking up the note; but the judge overruled the objection, and charged the jury, that the proof was sufficient to charge the defendant, and that they ought to find a verdict for the plaintiff. The jury, accordingly, found a verdict for the plaintiff, for 318 dollars and 37 cents. The defendant's counsel excepted to the opinion and direction of the judge, and tendered a bill of exceptions pursuant to the statute.

The declaration contained a count on the note, and the usual money counts. The count on the note, after stating the presentment of the note, and the refusal of payment, *&c. averred notice as follows: "of which the before-named plaintiff, afterwards, to wit, on the day aforesaid, gave notice to the before-named defendant."

A motion was made to set aside the verdict.

(a) Vide *Moad v. Eags*, 5 Cowen's Rep. 303.

Van Vechten, for the defendant. 1. The second endorser, on receiving notice of the note being dishonored, is bound to give notice to the first endorser, that he intends to look to him. In *Morgan v. Woodworth*, (3 Johns. Cases, 89.) the court said, that when the second endorser is called on for payment, in default of the maker, he ought to take up the note immediately, and give immediate notice to the first endorser. This general principle is laid down as a settled rule, without adverting to the fact of a notice having been given to the first endorser by

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the holder. (a) Such, also, appears to be the mercantile usage. (*Jameson v. Swinton*, 2 Taunt. Rep. 224. *Hilton v. Shepherd*, 6 East, 44. note. *Bayley v. Betts*, 83. *Chitty on Bills*, (2d ed.) 166, 167. 2 Bro. P. C. 265.) The plaintiff has averred, that he gave notice of the demand and non-payment to the defendant; and if that averment was necessary, it ought to be proved. The fact is, that the defendant received no notice from the plaintiff until more than a year after the protest, and then only by the present suit.

Foot, contra. In *Morgan v. Woodworth*, the defendant, who was the first endorser, had not received notice from any person whatever, either from the holder or the second endorser. That case goes no further than to decide, that the first endorser is not liable without notice; and if the second endorser looks to him, he must take care that he receives *due notice. If any thing more is said by the court, it is a *dictum* merely. But the decision in that case is according to the well settled rule in *England*, that the endorser must have notice from some person who has a right of action on the bill. (b) Though *Bayley* and *Chitty* state this to be the rule, yet they advise, for greater caution, that each party, immediately on receiving notice, should give notice, also, to the parties who may be liable over to him, and against whom he will be obliged to prove notice; and the case of *Morgan v. Woodworth*, shows the propriety of that caution. But all the books agree that a notice by the holder, accrues to the benefit of all the preceding parties. The holder may be satisfied with giving notice to his immediate endorser only; but if he does, in fact, give notice to all the endorsers, it will accrue to the benefit of each endorser. (*Chitty on Bills*, 166. (239.) *Bayley*, 83. *Kyd on Bills*, 126.) In *Jameson and others v. Swinton*, (2 Camp. N. P. Rep. 373.) the objection was, that the defendant, who was the first endorser, had received notice of the dishonor of the bill from the second endorser, and not from the plaintiffs themselves, who, as holders, had given notice to their endorser; and that the plaintiffs could not avail themselves of a notice given by a third person; but *Lawrence, J.*, said, that he did not remember to have heard the objection made before; and was of opinion that the endorser was liable, if he had due notice of the dishonor of the bill from any person who was a party to it. (*Shaw v. Croft*, *Chitty on Bills*, 180. note.)

Per Curiam. We see no ground to doubt the correctness

(a) In the case above cited, no notice was given by the holder to the first endorser, though a notary was employed by him for that purpose. The notary was, afterwards, sued by the second endorser for his neglect, in not giving the notice, pursuant to his engagement to the holder: but the court held, that the action could not be sustained, on the ground, that the special undertaking of the notary to A., the holder, would not enure to the benefit of M., the second endorser, and it was no part of the general duty of a notary to give notice to the endorsers. (*Morgan v. Van Ingen*, 2 Johns. Rep. 204.)

(b) Vide *Utica Bank v. Smith*, ante, 230.

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of the decision at the circuit. Upon authority, as well as sound reason, it is sufficient that the first endorser had notice from any subsequent holder of the note, of the default of the maker, and that he would be looked to for payment; provided such notice were given immediately after such default. The only object in requiring notice is, that such endorser may have recourse to the *maker*, to indemnify himself. And whether, after such notice, the first endorser be sued by the second, or third endorser, is immaterial; and *notice of non-payment, &c. from either of them, enures to the benefit of all who stand behind him on the note.

As to the delay on the part of *Stafford*, in taking up the note, it cannot lie in the mouth of the first endorser to impute *laches* to him. *Yates* was bound to save his endorsee harmless, and he ought to have taken up the note himself. The *laches* lies at his own door. The case of *Jameson and others v. Sicinton*, (2 *Campb. N. P.* 373.) before *Lawrence, J.*, is in point for the plaintiff. (a)

Judgment for the plaintiff.

(a) The French law fixes, with great precision, the time within which the parties to a bill which is protested, are to bring their respective actions.

Where the bill is payable in France, fifteen days after the protest are allowed, if the drawer or endorser lives within ten leagues of the place where the bill is payable; and an additional day is allowed for every five leagues beyond that distance.

The periods of delay, as to bills payable in different countries, are regulated in the same manner: and if the *holder*, or any of the endorsers, neglect to pursue their remedy against the parties liable to them, within the periods so prescribed, their rights are barred. (*Pothier, trait. de Cont. du Change*, n. 152 153. *Code de Commerce*, liv. 1. tit. 8. sect. 11.)

JACKSON, *ex dem.* NEILSON and WIFE, *against* M'VEY
and others.

An attorney or counsel of the plaintiff or defendant, may be compelled to testify whether

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a deed described by the adverse party is in his possession or not, so as to authorize the other party, on his refusing to produce it, after notice for that purpose, to give *parol* evidence of its contents.

A declaration or confession by

EJECTMENT for land in *Wallkill*, tried at the *Orange* circuit, in *November*, 1818, before Mr. Justice *Van Ness*.

The plaintiff gave in evidence letters patent to *P. V. B. Livingston* and *John Prevost*, dated *May* 26, 1750, for 3,000 *acres of land; and a release in fee for the same land from the patentees to *James Alexander*, dated *May* 29, 1750. It was proved that *James Alexander* died some time between the years 1750 and 1760, leaving one son *William*, afterwards Lord *Stirling*, who died in the spring of 1783, leaving two daughters, *Catharine* and *Mary*, two of the lessors of the plaintiff. A witness for the plaintiff proved that the premises in question were included within the bounds of the patent, which is only seventeen chains wide. The witness stated, on his cross-examination, that more than thirty years ago, *Duncan Brown* lived on the south-east part of the line near the river *Wallkill*, and the prem-
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ises in question, which were then in woods and unenclosed, claiming the farm he possessed as his own, having purchased it of *James Alexander*; and that *D. B.* died on the farm before the revolutionary war. The defendants' counsel then offered to prove by the same witness, that *Duncan Brown* claimed the premises in question as included within the lands purchased by him of *James Alexander*, which was objected to by the plaintiff's counsel, and overruled by the judge.

The defendants proved that *Duncan Brown* died long before the revolutionary war, and that he lived near, but not upon the premises in question; the country being then a wilderness. That *Daniel M'Vey*, the husband of the defendant, *E. M'Vey*, and father of the other two defendants, first entered upon and cleared a part of the premises in question, about twenty-eight years ago. The defendants' counsel then gave notice to the plaintiff's counsel to produce a deed given by *James Alexander* to *Duncan Brown*, dated about the 31st of May, 1750, for 993 acres of land, being then the farm on which *D. B.* lived, and the lands adjoining; and it was proved, by *John Cox*, that about four years ago, he delivered up to *Samuel W. Brown*, one of the lessors of the plaintiff, that deed. It was objected, that the notice to produce the deed being given on the trial, was insufficient. The defendants' counsel then called upon the plaintiff's counsel to testify that the deed was then in court and in his possession; this was objected to, but the judge overruled the objection, deciding that it was not within the privilege of the counsel, to refuse to be a witness for that purpose, and *that the defendants having proved the deed to be last in the possession of the plaintiff, the counsel were bound to answer the question. The plaintiff's counsel then admitted that he had in his hands, a deed from *James Alexander* to *Duncan Brown*, for 993 acres of land, in lot No. 18 and 19, in the *Minisink* angle; but refused to produce the deed. *J. Cox* then testified that he was the executor of *John Brown*, the son and executor of *Duncan Brown*, and that the deed above mentioned by him had been, for many years, in his possession, and that he had often perused it, and always supposed the premises in question included in that deed. On being cross-examined, he said, that he had a very imperfect recollection of the boundaries in the deed; nor could he, from his recollection, state a single course which it contained: that he supposed and thought, but did not know, that it included the premises in question: that he had always supposed that the deed was for lot No. 18 in the *Minisink* angle, which is part of the *Minisink* patent. The defendants then offered to prove that *D. B.* in his life-time, and his children since his death, had always claimed the premises as part of the land conveyed to him by *James Alexander*; but this was overruled by the judge, unless the defendant first proved an actual possession of the premises by *D. B.* or his heirs. The defendants then called on the plaintiff pursuant to

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one of the lessors of the plaintiff in ejectment, is evidence against all of them.

The evidence of a witness called to prove the contents of a deed which the adverse party has in his possession, in court, and has refused to produce, after notice for that purpose, is not to be rejected, because the witness, though he had often perused the deed, was unable to recollect any of the courses stated in the description of the premises contained in it; the object of

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the inquiry being to show that the premises in question were included in such deed; and by not producing the deed, when called for, a strong presumption arises against the party, that it does contain the premises, as testified by the witness.

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Where the plaintiff claimed a sum of money of the defendant who denied it, but promised that if the plaintiff would swear to the correctness of the claim, he would pay it, and the plaintiff made affidavit accord-

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ingly: *Held*, that this was a valid promise; and that in an action to recover the amount sworn to, it was not competent to the defendant to prove that the plaintiff had sworn falsely, or that he was mistaken in his affidavit.

IN ERROR, to the Court of Common Pleas of *Orange* county. *Ball* brought an action of assumpsit against *Brooks*, in the court below. The declaration contained a special count, stating that the plaintiff claimed of the defendant the sum of one hundred dollars, which the defendant denied that he owed to the plaintiff, but promised that if the plaintiff would make oath to the correctness of his claim, he the defendant would pay the amount thereof; and averred, that the plaintiff did make oath to the truth and correctness of his claim, but that the defendant, notwithstanding his promise, refused to pay the one hundred dollars, &c. The declaration also contained the common money counts. The defendant pleaded the general issue.

After the plaintiff's counsel had stated his case, the defendant's counsel insisted that admitting the facts stated to be proved, they were not sufficient to support the action; because the promise of the defendant was without consideration and void; and the plaintiff could not lawfully support his claim on his own affidavit. He, therefore, moved that the plaintiff should be nonsuited; but the objection was overruled by the court. The plaintiff then went into the evidence in support of his case. It was proved, that the defendant made the promise alleged; that the plaintiff had made the affidavit and demanded payment of the one hundred dollars; and that the defendant had admitted his liability to pay the money, and intended to pay, but was advised to the contrary.

The defendant's counsel then offered to prove, that the plaintiff, in his affidavit, had sworn falsely, or was grossly mistaken. This evidence was objected to, and overruled by the court. And the counsel for the defendant tendered a bill of exceptions. The jury, under the direction of the court, found a verdict for the plaintiff, for 110 dollars and 50 cents.

Wisner, for the plaintiff in error. This case is distinguishable from the cases which are to be found in the books. They will be found to be cases where the defendant promised to pay a precedent debt, if the plaintiff would prove it by a third person. Here the debt was to be created by the promise to pay, on the oath of the plaintiff himself. It is against the fundamental principle of law, that a party should be a judge in his own cause, or give evidence in his own favor.

If such a promise can be a foundation for an action, it is at most, *prima facie* evidence, and may be rebutted by showing that the plaintiff swore falsely, or was mistaken. (2 *Comyn on Contracts*, 449. 450.)

Betts, contra. In *Knight v. Rushwood*, (*Cro. Eliz.* 469.)
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the defendant promised, that if the plaintiff and two witnesses would depose before the Mayor of *Lincoln*, as to a bond of a third person, the defendant would pay it. *Bretton v. Prettiman*, (*T. Raym.* 153.) is precisely in point to show that this action may be maintained. The defendant promised that in consideration that the plaintiff would take an oath that money was due to him, he would pay it; and the plaintiff took an oath before a master in chancery, and brought assumpsit for the money, and recovered. (*S. C.* 1 *Sid.* 283. 2 *Keble*, 44.) In *Stevens v. Thacker*, (*Peake's N. P. Cases*, 187, 188.) the holder of a bill of exchange promised not to sue the acceptor, if he would make affidavit that the acceptance was a forgery. The affidavit was drawn, but the defendant did not swear to it. Lord *Kenyon* said, that if the defendant had sworn to the affidavit, he should have held that he had discharged himself from the action, though the affidavit had been false. 1 *Mod.* 166. *Lloyd v. Willan*. 1 *Esp. N. P. Cases*, 178, 179. *Dellesline v. Greenland*, 1 *Bay's S. C. Rep.* 458. *S. P.*) One promise is a sufficient consideration for another promise. (8 *Johns. Rep.* 306.)

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SPENCER, Ch. J., delivered the opinion of the court. The principal question presented by this case is, whether a promise to pay a sum claimed to be due by one party and denied by the other, if the party claiming would swear to the correctness of the claim, and he does so swear, is a valid promise? Another question was made on the trial, whether it was competent to the defendant below to prove that the plaintiff below either swore falsely or was grossly mistaken in the affidavit which he made.

It has been frequently decided, that a promise to pay money, in consideration that the plaintiff would take an oath that it was due, was a valid and binding promise. Thus in *Bretton v. Prettiman*, (*Sir T. Raym.* 153.) the plaintiff declared that the defendant promised, in consideration that the plaintiff would take an oath that money was due to him, he would pay him, and the plaintiff averred that he swore before a master in chancery. On demurrer, it was adjudged for the plaintiff, and, as the reporter states, because it was not such an oath for which he may be indicted. In *Anin & Andrews*, (1 *Mod.* 166.) there was a promise to pay, if the plaintiff *would bring two witnesses before a justice of the peace, who should depose that the defendant's father was indebted to the plaintiff; and two judges against one, thought it not a profane oath, because it tended to the determining a controversy, and the plaintiff had judgment. This case occurred before the statute of frauds; the promise would now be holden to be void, unless in writing, it being to pay the debt of a third person. The case of *Bretton v. Prettiman*, is differently stated in 1 *Sid.* 283. and 2 *Keb.* 26. 44. It is there stated to be a promise to pay, if the plaintiff would procure a third person to make oath that the

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money was due. But this makes no difference in principle, for, in either case, the oath was extra-judicial.

In *Stevens and others v. Thacker*, (*Peake's N. P. Rep.* 187.) the defendant was sued as the acceptor of a bill, and alleged it to be a forgery, and offered to make affidavit that he never had accepted it. The plaintiff agreed not to sue the defendant, if he would make the affidavit. The affidavit was drawn, but not sworn to. Lord *Kenyon* said, that had the defendant sworn to the affidavit, he should have held, that he had discharged himself, though the affidavit had been false; for the plaintiffs, who had agreed to accept that affidavit, as evidence of the fact, should not, after having induced the defendant to commit the crime of perjury, maintain an action on the bill. In *Lloyd & Willan*, (1 *Esp. Rep.* 178.) the defendant's attorney proposed to the plaintiff's attorney, that the defendant should pay the demand, if the plaintiff's porter would make an affidavit, that he had delivered the goods in question to the defendant. The affidavit was made; and Lord *Kenyon* held it to be conclusive, and that the defendant was precluded from going into any defence in the case.

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These cases, which stand uncontradicted, abundantly show that such a promise as the present, is good in point of law; and that the making the proof or affidavit, whether by a third person or by the party himself, is a sufficient consideration for the promise. It is not making a man a judge in his own cause; but it is referring a disputed fact to the conscience of the party. It is begging the question to suppose that it will lead to perjury. If the promise is binding, *because the making the proof or affidavit is a consideration for it, the defendant must necessarily be precluded from gainsaying the fact. (a) He voluntarily waives all other proof; and to allow him to draw in question the verity or correctness of the proof or affidavit, would be allowing him to alter the conditions of his engagement, and virtually to rescind his promise.

Judgment affirmed.

(a) Such is the principle of the civil law, as to the effect of the *decisory* oath (*le serment decisoire*) as the French lawyers term it, or the oath of verity, as it is called in the Scotch law. The *Digest* contains many just rules and distinctions as to the cases in which the oath may be deferred. It is considered as an agreement or contract between the parties, (*transactio*;) and as of greater force even than a judgment, (*res judicata*.) It might be deferred in regard to all matters of civil controversy, and in any stage of a cause; but it could be deferred to a party, in respect only to his own *personal* acts. When taken, it constituted the *presumptio juris et de jure*, which precluded all proof to the contrary. The party became entitled to judgment in his favor, or to be for ever discharged from the cause of action. Either party might defer the oath to the other. If the party to whom the oath was deferred, refused to take it, or to refer it back to the other, he lost his cause; if the one to whom the oath was referred back, took it, what he swore to was deemed conclusively proved. "Cum res iusjurandum demissa sit, iudex absolvit: referentem audiet, et si actor juret, condemnet reum: nolentem jurare reum, si solvat, absolvit: non solventem condemnat: ex relatione, jurante actore, absolvit reum." (*Dig. lib. 12. tit. 2. l. 34. Poth. Trait. des Oblig. Part 4. ch. 3. s. 4. No. 912, 913, 914. Ersk. Inst. 779. Book 4. tit. 2. s. 8, 9.*)

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IN ERROR to the court of common pleas of *Oneida* county.
 *M. brought an action against the plaintiffs in error, in the court below, on a bank note, dated *September* 1st, 1815, at *Utica*, by which the President, Directors and Company promised to pay to *Thomas Jefferson*, or bearer, on demand, five dollars. The declaration averred, that the plaintiff became lawfully possessed of the note, on the 20th of *January*, 1818, and, on that day, presented it to the defendants, at their banking house in *Utica*, and demanded payment thereof, which was refused. The defendants pleaded the general issue, with notice of special matter to be given in evidence. At the trial, the plaintiff proved the note, and that, on the 1st of *August*, 1817, it was presented to the defendants, at their bank in *Utica*, who refused payment, alleging, that it ought to be presented at the office of the branch at *Canandaigua*. The plaintiff, also, proved, that notes of the defendants' bank, countersigned "*O. Seymour*," were paid out and received at their banking house in *Utica*, in like manner as the notes of other country banks were paid out and received by the defendants; but it did not appear, that notes countersigned by *O. Seymour* were ever originally issued at the banking house of the defendants, in *Utica*. The defendants, then gave in evidence the act passed the 10th of *April*, 1815, entitled, "an act authorizing the President, Directors and Company of the Bank of *Utica*, to establish an office of discount and deposit at the village of *Canandaigua*, in the county of *Ontario*, and for other purposes." By this act it was declared, that no notes of the said bank should be issued at the branch, excepting such as should be countersigned by the cashier; and that the same should then be considered as payable on demand at the office of the said branch. The defendants proved, that *O. Seymour*, whose name was countersigned on the note, was cashier of the said branch, in the village of *Canandaigua*, and that the signature was in his hand-writing, the word "countersigned" being engraved on the note.

The defendants insisted, that on this evidence they were entitled to a verdict. But the court decided, that the evidence of the defendants was not sufficient to bar the plaintiff, and that he was entitled to recover; and the *jury, accordingly, found a verdict for the plaintiff, for five dollars and 70 cents. The defendants' counsel tendered a bill of exceptions, on which the writ of error was brought to this court.

Foot, for the plaintiffs in error. A corporation can act in no other way than that which is prescribed in its charter. (2 *Johns. Rep.* 109.) By the act, (sess. 38. ch. 144.) the notes of the

According to the true construction of the act, (sess. 38. ch. 144.) authorizing the P., D. & Company of the bank of *Utica* to establish an office of discount and deposit, at *Canandaigua*, in the county of *Ontario*, and requiring all notes issued at such branch at *C.* to be countersigned by the cashier, and declaring that the same should be considered as payable on demand, at such branch at *C.*, the holder of a note of the bank of *Utica* so countersigned and issued, cannot maintain an action upon it against the bank of *Utica*, without having previously demanded payment of it at the branch at *C.* A demand of payment at the bank in *Utica*, only, is not sufficient.

A note of the *Utica Bank*, on which is written, "countersigned *O. Seymour*," is countersigned within the meaning of the

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act; for it is not necessary to give it validity, that he should add to his name his official character of cashier at *C.*; and the act in question being in exten-

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sion of the powers of the bank under their act of incorporation, which was a public act, is also a public act of which every person is bound to take notice.

The presumption, in such case, is, that the signing is official; and if there is any ambiguity on the face of the instrument, it may be explained by parol.

plaintiffs so made and countersigned, though dated at *Utica*, are made payable, on demand, at *Canandaigua*. A promissory note, payable on demand at a particular place, must be presented for payment at that place. (14 *East*, 498. 2 *Taunt. Rep.* 60. 3 *Taunt. Rep.* 397. 16 *East. Rep.* 108. 5 *Taunt. Rep.* 30.)

The damages recovered, in this case, being only five dollars and 70 cents, the plaintiff was not entitled to costs. The court below awarded 35 dollars and 50 cents, for costs. As corporations are not expressly excepted in the act giving jurisdiction to justices of the peace, the plaintiff might have sued in a justice's court. (1 *N. R. L.* 387.) Costs are not given by the common law, and the statute relative to costs is to be construed strictly.

Lee, contra. The note was duly presented, and payment demanded, at the banking house of the defendants at *Utica*. The name of *O. Seymour* was, indeed, written on the note after the word "countersigned," but without any addition. He ought to have added the words "cashier of the office of discount and deposit at *Canandaigua*," otherwise the public cannot know that the note is of that description which is payable only at the branch at *Canandaigua*. The appointment of the cashier is a private act, and the public are not informed, by the words "*O. Seymour*," that he is the cashier of the branch at *Canandaigua*, or that the note was issued there. For aught that appears, it was issued at the *Utica* bank.

Again; though a demand might be made at *Canandaigua*, yet the plaintiff had, also, a right to demand payment of the makers of the note at *Utica*. By the act incorporating the *bank, the defendants, in regard to notes issued by them, are placed on the same footing as an individual.

Again; we say, that no demand of payment was necessary, before bringing the suit. For where a precedent debt or duty exists, no demand previous to bringing a suit is necessary; though it may be otherwise, where the obligation to pay is collateral. (*Wolcott v. Van Santvoord*, 17 *Johns. Rep.* 248. 1 *Saund.* 33. n. 2. 2 *Saund.* 118. n. 3. *Comyn's Dig. Pleader.* (C.) 69, 70. 4 *Johns. Rep.* 183. 10 *Mod.* 38. *Bayley on Bills*, 110. 78. n. a.)

As to costs; this court has decided, that a corporation cannot be sued in a justice's court. (5 *Johns. Rep.* 347. 7 *Johns. Rep.* 356.) As the plaintiff is, therefore, compelled to sue in the court of common pleas, he is entitled to costs in that court. The case is within the reason of the rule as to executors and administrators. (2 *Johns. Cases*, 209. 3 *Johns. Rep.* 450. 6 *Johns. Rep.* 332. 7 *Johns. Rep.* 537. 8 *Johns. Rep.* 123.)

SPENCER, Ch. J., delivered the opinion of the court. The question arising on the record, is, whether the bank of *Utica*

is liable to be sued, since the act of the 10th of *April*, 1815, on a note of that bank, countersigned by *O. Seymour*, the cashier of the office of discount and deposit in the village of *Canandaigua*, unless it be averred and proved that payment has been demanded at such office of discount and deposit, before the commencement of the suit.

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The act of the 10th of *April*, 1816, (sess. 38. ch. 144.) provides, that the bank of *Utica* may establish an office of discount and deposit at *Canandaigua*, under such rules and regulations as they shall prescribe, not contrary to the provisions of the act of incorporation; and that no notes of the bank of *Utica* shall be issued at the branch bank, excepting such as shall be countersigned by the cashier; and the same shall then be considered as payable on demand, at the office of the said branch.

The object of the act was to transfer a part of the capital of the bank of *Utica*, to the office of discount and deposit at *Canandaigua*, for banking operations there. The ability of the bank of *Utica* to redeem the notes issued by it, and especially *as to such as were issued at the branch, was impaired, in proportion to the capital furnished to the branch. It appears to me to have been manifestly the intention of the legislature that notes countersigned by the cashier of the branch bank, and issued from it, should be demandable, in the first instance, at the branch. *They are then to be considered as payable on demand at the office of the said branch.* That enactment, *ex vi termini*, excludes the idea, that with respect to bills thus countersigned and issued, they shall be payable, also, on demand, at the *Utica* bank. Considering the object and provisions of the act, we have no hesitation in saying, that payment of such bills must first be demanded at the branch. Any other construction would defeat the obvious intention of the legislature, and the declared purposes of the act. There can be no doubt that, if payment be refused, upon the presentment of a note countersigned and issued as prescribed by the branch, but that the *Utica* bank would be liable; but until such demand be made, there is no default. We consider the act as imposing it, as a pre-requisite duty, on the holder of such a bill to make a demand at the branch, before the *Utica* bank can be called upon.

It has been objected, that the note given in evidence was not countersigned, within the meaning of the act; *Seymour* not having added to his signature the title of his office. The act prescribes no form of countersigning the notes issued by the branch. It requires only that the notes issued by the branch should be countersigned by the cashier; and it is in proof that *O. Seymour* was the cashier. He has not added to his signature his official character; and we do not think this necessary. The act of 1815 is a public statute; for being an extension of the powers of the bank of *Utica*, and the original act being a public act, the enlarging act must necessarily be a public act.

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When, therefore, it is considered, that every person must be deemed conusant of the law of the land, and of the statute vesting the bank of *Utica* with the power of establishing a branch, and requiring the notes issued by it to be countersigned; and when it is seen on the bill itself, that it is countersigned, there could exist no doubt on the mind of any one, that the bill in question had *been issued under the authority of the act of 1815. But in the present case, the plaintiff below was expressly informed, before he brought his suit, that this note ought to be presented at the branch. Independently of these considerations, it was not necessary to the validity of the act of countersigning, that *Seymour* should have added to his name his official character of *cashier*. This point was considered by the Supreme Court of the *United States*, in the case of the *Mechanics' Bank v. the Bank of Columbia*, (5 *Wheaton*, 334.) The check, in that case, wanted the official signature of the cashier; yet it was held, that it was an official, and not a private act, and that it was not true that the acts of agents derived their validity from professing, on the face of them, to have been done in the exercise of their agency. In that case, the court were of opinion, that the marks of an official character not only existed on the face of the check, but predominated, and that evidence to fix its true character became indispensable. In the present case, marks that *Seymour* countersigned this note, as cashier, greatly predominate. Who ever heard of a bank bill being thus countersigned by a private individual, and especially when the word "countersigned" is engraved on the bill? But when we consider this countersigning in connection with the act of 1815, there cannot remain a doubt, that it was an official act and a compliance with the statute.

Judgment reversed.

JACKSON, *ex dem.* VAN BUSKIRK, *against* CLAW.

Cohabitation, and the declarations of the parties, are *prima facie* evidence of marriage.

But where, without any apparent rupture, the parties, after a cohabitation of about two years, separated, nearly forty years ago, and continued separate, with-

EJECTMENT for land in *Cocksackie*, tried at the *Greene* circuit, in *December* last, before Mr. Justice *Van Ness*.

[* 347] *The plaintiff proved, that *John A. Van Buskirk* owned the farm on which the defendant now lives, and sold it to the defendant, about 15 years before the trial. That the lessor of the plaintiff, *Hannah Van Buskirk*, as widow of *John A. Van Buskirk*, presented her petition to the Court of Common Pleas of *Greene* county, to have her dower in the farm so purchased and occupied by the defendant, set off to her, and admeasurers were accordingly appointed, who made their report, setting off twenty-three acres of the farm to the lessor, for her dower, which report was filed and recorded on the 30th of *May*, 1819. The present suit was brought to recover the

possession of the twenty-three acres, parcel of the farm of the defendant, so assigned and set off to the lessor, for her dower. The defence set up at the trial was, that the lessor of the plaintiff was not the lawful wife of *John A. Van Buskirk*. A witness for the plaintiff testified, that he had known *John A. Van Buskirk* and his wife, the lessor, between 35 and 40 years, during which time, they resided at, and near *Cocksackie*, lived together as man and wife, and had several children, the eldest being about 37 years old. That the lessor of the plaintiff had, during all the time the witness was acquainted with her, sustained a good character in society. That he knew her husband when he was a boy; that he was born in *New-Jersey*, and went from *Cocksackie* to that state, before the revolutionary war, and returned again to *Cocksackie*, after the peace. Another witness, on his cross-examination, said, that *John A. Van Buskirk* told him, that he had a wife previous to his marriage with the lessor, but that his first wife died before his second marriage.

J. S., a witness for the defendant, testified, that he knew the lessor of the plaintiff 50 years ago, and that her maiden name was *Pudney*, and she once lived with the witness's mother, at *Fishkill*, as a hired servant. That in *October*, 1779, *John A. Van Buskirk* hired a room of the witness, for himself, and a woman he called his wife, and a child named *John*. The woman's maiden name was *Jane Blauw*, and they both said that they were married. They occupied the room until *April*, 1780, (and during that time *Hannah Pudney* lived in the same house, as a servant to the mother of the *witness,) when *Van Buskirk* removed with his family to *New-Marlborough*, where he remained about a year. In *April*, 1781, *Van Buskirk* came to the house of the witness at *Fishkill*, and said, that he and his wife had parted, and that she had gone to *Long-Island* to her friends. He wished to be hired, and the witness, accordingly hired him, and he continued in the service of the witness, about six months, during which time the lessor lived in the family, and married *Van Buskirk*, and in the same year, they removed to *Athens*.

The counsel for the plaintiff objected to the declarations of *Van Buskirk* as evidence of his former marriage; but the judge overruled the objection.

J. S., the witness, on being asked by the plaintiff's counsel, whether *Van Buskirk*, before his second marriage, had not told him that his first wife was dead, answered, that *Van Buskirk* showed him a letter, stating that his first wife was dead; but the witness knew it to be in the hand-writing of *Van Buskirk* himself. The witness stated, that he had not seen the first wife of *Van Buskirk*, since she left *Fishkill*, in 1780; that in *December*, 1783, he was on *Long-Island*, when he heard that *Van Buskirk's* first wife was living, and had recently been there on her way to *Nova Scotia*, where she intended to reside;

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out any claims or pretensions on each other as husband and wife, it seems, that the presumption of marriage arising from the previous cohabitation, will be rebutted.

A. and B., after cohabiting, as man and wife, separated in 1781, and the wife went to her friends in 1783, when she removed out of the state, and was never heard of afterwards. Her husband, in 1781, married another woman, with whom he lived 38 years, and died leaving children: *Held*, that the absence of the

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first wife, for seven years, from 1783 to 1790, without having been heard of during that time, was sufficient to afford a presumption of her death; and although the second marriage of A. in 1781, was void, his first wife being then living; yet his continued cohabitation with his second wife for 27 years after 1790, and the reputation of their marriage, and the good character in society of the parties, during all that time, and until the death of A., afforded sufficient ground to pre-

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precise and definite sum, as a tax on the inhabitants of the district, for building a school house, &c. And the trustees of the school district are not authorized, by a general vote of such meeting, for levying a tax to defray the expenses of building a school house, without specifying the sum to be levied, to issue their warrant for the levy of the money expended by them, for that purpose.

freeholders and inhabitants of a school district, "to vote a tax on the resident inhabitants of such district, as they shall deem sufficient to purchase a suitable site for their school house, and to build, keep in repair, and furnish such school house," &c. and to choose three trustees, and a collector for the district, &c. (sec. 13.) and it is made the duty of the trustees of the school district, "to make a rate bill, or tax list, which shall raise the sum voted for," with five per cent. for collection, and to annex to such rate bill or tax bill, a warrant for the collection of the tax in the form prescribed. (Sec. 18.)

It was proved, that the freeholders and inhabitants of S. at a regular meeting, passed the following resolution: "Resolved, that a school house be built on the same site where the old one stood, and of the same size as the old one; and that the trustees of the said district levy a tax on the inhabitants of said district, to defray the expenses of the same."

On the trial before the justice, the jury found a verdict for the defendants, on which the justice gave judgment.

On the return to the *certiorari*, the only question was, whether the vote of the freeholders and inhabitants, for a tax, in the general form of the resolution above mentioned, was sufficient to authorize the collection of any tax, or whether the vote ought not to be for a precise and determinate sum to be assessed and raised.

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*PLATT, J., delivered the opinion of the court. According to the rules for the construction of such special powers as are conferred by this statute, I am of opinion, that without a subsequent *audit*, or *sanction* of the freeholders and inhabitants of the district, at a regular meeting, liquidating the precise amount to be raised, the trustees of the school district were not authorized to issue their warrant to collect the money expended by them in building the new school house. The freeholders and inhabitants, at their meeting, had no right to delegate to the trustees any discretionary power, as to the aggregate amount of the tax to be collected. They are required to "make a rate bill, or tax bill," &c. "to raise the sum voted for," which implies a vote for a definite sum. The judgment must, therefore, be reversed.

Judgment reversed.

MAYBEE against AVERY.

A verdict and judgment thereon, to be evidence, must be on the same point, and between the same

THIS was an action of *slander*, tried before Mr. Chief Justice *Spencer*, at the *Albany* circuit, in *October*, 1818.

The words laid in the declaration, as spoken by the defendant of the plaintiff, were: "You are a thief." "You stole my hens." "He stole my hens." "I as much believe he

stole my hens, as I am alive." The defendant pleaded the general issue, with notice of special matter to be given in evidence, justifying the truth of the charge.

At the trial, the plaintiff proved, that the defendant, in the spring of 1816, had spoken the words charged. The defendant then produced a record of conviction before three *justices of the peace, at a court of special sessions, held by them on the 13th of *April*, 1818, by which it appeared, that the plaintiff was convicted before the said justices, of stealing two hens of the defendant, and was fined for the offence, seven dollars. To the admission of this evidence, the plaintiff's counsel objected; and the chief justice decided, that although the record might not technically be considered as a bar to the plaintiff's action, yet it was evidence of the plaintiff's guilt, and went to show, that there was no malice on the part of the defendant, in speaking the words; and that he should allow it to be read for that purpose, and it was, accordingly, read in evidence.

The plaintiff then offered to show, that the evidence on which the conviction was founded was false, and to prove that he was owner of the two hens mentioned as the subject of the petit larceny, of which he was convicted before the justices. To this evidence the defendant's counsel objected, on the ground, that the record of conviction, until reversed, was conclusive evidence of the fact of the plaintiff having stolen the hens in question. This objection was sustained by the chief justice, and the evidence rejected; and the jury, under his direction, found a verdict for the defendant, with leave for the plaintiff to move to set it aside, on a case made. It was admitted, at the trial, that the conviction of the plaintiff was before the commencement of the present suit, and that the defendant was not a witness at the trial in the Court of Special Sessions.

The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The question whether the record of conviction was evidence or not, is certainly not free from doubt. Both *Peake* and *Phillips* treat it as a point pretty much afloat, and I have met with no case expressly deciding it. The case of *Jones v. White*, (1 Str. 63.) independently of the loose manner in which the judges speak, and the nature of the issue, cannot be considered an authority, for the court was equally divided. *Buller*, in his *Nisi Prius*, (245.) lays down the law to be, that "though a conviction in a court of criminal jurisdiction be conclusive evidence of the fact, if it afterwards *come collaterally in controversy, in a court of civil jurisdiction, yet an acquittal in such court is no proof of the reverse. As, suppose the father convicted on an indictment for having two wives, this would be conclusive evidence in ejectment where the validity of the

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parties or privies. (a)

Where the matter in dispute is a question of public right, all persons standing in the same situation are affected by it.

As, where the public is a party aggrieved, and the prosecution is carried on through their officers, any individual may avail himself of the conviction. Therefore, in an action of slander, for saying that the plaintiff was a *thief*, and stole the defendant's hens, a record of a conviction of the plaintiff before a Court of Special Sessions, for stealing the defendant's hens, is admissible evidence under a notice or plea of justification by the defendant, of the truth of the words spoken. The verdict of conviction in such case is, however, only *prima facie* evidence, and the plaintiff, therefore, is allowed to disprove the fact, and to give evidence of the falsity

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of the evidence on which the conviction was founded. But the conviction cannot be received in evidence at all, if the defendant

(a) Vide *Gardner v. Buckbee*, 3 Cowen's Rep. 120. *Burt v. Sternburg*, 4 Cowen's Rep. 523. *Davis v. Wood*, 1 Wheat. Rep. 6. *Barr v. Grant*, 4 Wheat. Rep. 213.

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in the civil suit,
and the party
aggrieved, was
a witness in the
criminal prosecution.

second marriage was in dispute. But an acquittal would not prevent the party from giving evidence of the former marriage, so as to bar the issue of the second; for an acquittal ascertains no fact, as a conviction does, nor would a conviction be conclusive, so as to bar the party in a writ of dower or appeal, when the legality of the marriage comes in question. And he proceeds to say, that it would then be *prima facie* proof of it. *Gilbert*, in his *Law of Evidence*, (p. 32.) expresses his opinion, that in an action of trespass, an indictment for the same trespass, and verdict thereupon, may be given in evidence, if the verdict is founded on other evidence besides the party's own oath. I entirely concur with *Phillips* (*Ex. 237. 241.*) and *Peake*, (*on Evid. 3d ed. p. 41. 47.*) that the conviction ought not to be received as evidence at all, where the party aggrieved, and who is a party in the civil suit, was a witness on the prosecution, for it would be impossible to say what influence his evidence had in inducing the verdict. It is, undoubtedly, a rule, that to give a verdict, and judgment thereon in evidence, it must be upon *the same point*, and between *the same parties* or privies. The reason why it must be between the same parties is, that otherwise a man would be bound by a decision in which he was not at liberty to cross-examine the witnesses; and generally, the benefit of the rule is mutual; and one who is not a party to the cause, and would not be bound by the verdict, if against him, cannot avail himself of it. One of the exceptions to the rule is, that where the matter in dispute is a question of public right, in that case, all persons standing in the same situation as the parties, are affected by it. It appears to me that a verdict on an indictment forms another exception, and upon the same principle. The public is the party aggrieved, the prosecution is carried on through their functionaries, and any individual may, when necessary, avail himself of a conviction. The plaintiff cannot complain of this, for he had an opportunity to cross-examine the witnesses, *to adduce his testimony, and to reverse the judgment, if erroneous.

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I am, however, of the opinion, that the verdict was not conclusive; that it was merely *prima facie* proof, and that the plaintiff ought to have been allowed to controvert the fact anew. Such a judgment would only be conclusive, when it came in question collaterally; not when the issue was directly whether the plaintiff was guilty of the larceny or not.

The conviction not appearing to have been founded on the defendant's evidence, it rebuts all idea of malice on the part of the defendant, in speaking the words. Even had the plaintiff succeeded in showing that he did not steal the hens, the verdict must have been either for the defendant, or merely nominal damages would have been given. Under these circumstances, we think the ends of justice do not require a new trial

New trial refused.

JACKSON, *ex dem.* VANDERLYN & BETTS, *against* NEWTON and others.

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EJECTMENT for part of lot No. 47, in *Bainbridge*. The cause was commenced in *May* term, 1818, and tried before Mr. Justice *Woodworth*, at the *Chenango* circuit, in *June*, 1819.

The lot, of which the premises are a part, was patented to *Timothy Church*, in *July*, 1786. The plaintiff gave in *evidence a judgment and execution against *T. Church*, in favor of *James and William Anderson*, in 1800, and a sheriff's deed dated *June* 4, 1801, recorded *Sept.* 8, 1803, for lot No. 47, sold under the judgment, to *James and William Anderson*: also, a judgment in favor of *John Taylor* against *William Anderson*, dated 19th *July*, 1808, and a record of the revival thereof, by *scire facias*, against the heirs and terre-tenants of *W. Anderson*, docketed 9th *August*, 1817, and a *fieri facias* issued on the judgment against them: also, a deed from the sheriff of the county of *Chenango*, to the lessors of the plaintiff, dated *October* 11, 1817.

The defendant's counsel objected to the plaintiff's recovery, on the ground that *W. Anderson*, or his heirs, or any person claiming under him, had never been in possession of the premises in question. But the objection was overruled by the judge.

The defendant proved, that the sheriff sold the whole of lot No. 47, and two farms of *W. A.* together, for 25 dollars. The defendant then offered to prove that lot No. 47, at the time of the advertisement by the sheriff, was occupied by six or seven different persons, in distinct parcels, claiming under deeds, and some of whom were in possession before *W. A.* purchased the lot, and others in possession under him, and that the defendants claimed adversely to, and by a title older than that of *W. A.* and that the description of the lot, merely by lot No. 47, in the said town, in the sheriff's advertisement and deed, was uncertain and insufficient; but the judge overruled the evidence. The defendant then gave in evidence a deed, dated 19th *February*, 1798, from *Timothy Church* to *Joshua Newton*, for one hundred acres of land, beginning at the north-west corner of lot No. 47, and described by metes and bounds, proved the 7th *June*, 1801, and recorded *June* 5th, 1813.

The plaintiff then called *Joshua Newton*, the grantor in the last-mentioned deed, as a witness, in regard to the execution of that deed. The defendants objected to the witness as incompetent; but the objection was overruled. The witness testified, that he moved on the premises the 26th of *May*, 1799, being about 28 years of age; that he first contracted for the land with *Eleazer C.* son of *Timothy C.*, which *was about four years before he removed to the lot, and that he took a bond for the

To constitute an adverse possession, it is necessary only that it should be taken under

[* 356] claim and color of title. If the defendant has a deed, under which his grantor claimed title, he is not bound to produce it, though called for by the plaintiff. And if the deed is produced, and is found defective, it will not destroy the effect of the defendant's possession. (a)

If a party in possession claiming title under a deed, supposing that there is some defect in the execution of his deed, applies to purchase the title of a person claiming the same premises, under a subsequent deed, with a view to strengthen or quiet his own title, it is not an abandonment of his own title, nor an acknowledgment of a superior title in another. Where the defendant entered into possession claiming title, and afterwards, took a deed for the land from the legal owners, under whom the plaintiff derived title by a subsequent

[* 357] deed; the possession of the defendant is to

(a) Vide ante, *Jackson, ex dem. Roosevelt and others, v. Wheat*, page 40.

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be considered
as adverse from
the beginning,
or, at least,
from the date
of his deed;
and not that
its adverse
character com-
menced from
the date of the
deed to the
plaintiff.

Where the
real estate of a
debtor consists
of a lot of land,
divided into
separate farms,
occupied by
several and dis-
tinct tenants,
the sheriff can-
not sell the
whole lot to-
gether, under
the general de-
scription of a
lot of land of a
certain number,
without any
specification of
the parcels
occupied as
separate farms,
&c. And if he
does so, the
court, on mo-
tion, will set
aside the sale.

deed. He took the deed from *T. C.* before he removed. When the sale was made under the judgment of *J. & W. Anderson*, he showed his deed to *Dr. Hyde*, who thought it defective; he, afterwards, showed it to *Benjamin Hovey*, judge of the *C. P.* of *Chenango*, who said he thought it defective, but advised the witness to keep possession of the land, and say nothing about the deed; and the judge took the proof of it. The witness said, the deed had no actual seal, but a flourish at the end of the grantor's name, with the letters *L. S.* made with a pen. When the deed was executed, it was said there was no wax or wafers, and that a flourish with a pen was equally good. He sowed the first crop on the premises in 1797. That feeling squeamish about his title, he went to *Schenectady*, to purchase *William Anderson's* right, or to sell his own, and was told that *W. A.* was dead, and that he must wait until the heirs were of age. That the witness gave two hundred dollars for the land he purchased, and paid *E. C.* fifty dollars in part. That he felt no alarm until he heard of the judgment against *T. C.* and understood that his deed was defective. On his cross-examination, he said that he had no reason to suppose that the deed to him was antedated, or that *Timothy Church* was not present when it was executed. The witness was present at its execution, and it was admitted by the parties to be sealed as well as signed. He gave a mortgage for the residue of the purchase, which he afterwards took up and destroyed. That the mortgage had no seal, but was signed with a flourish of the pen, as in the deed. *E. C.* was called as a witness, and testified that *J. N.* gave him a mortgage for the balance of the purchase money, and thought it was sealed with paste. Two other witnesses, who were sworn, testified that *Joshua Newton* first began to clear the premises in the year 1797. The points of law raised during the trial were, by consent, reserved, and the facts, as to the execution of the deed, summed up to the jury, who, under the charge of the judge, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial.

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**Cady*, for the defendants. 1. The sheriff's sale was void. It was made by virtue of an execution against the heirs and terre-tenants of *W. Anderson*, and no judgment was shown to warrant such an execution. Besides, *W. Anderson* had no legal estate in the premises, that could be sold by the sheriff. *Newton* was in possession of the land, claiming to hold under the deed from *T. Church*, adversely. This adverse possession had commenced prior to *Taylor's* judgment, and had continued all the time. No title, therefore, passed by the sheriff's deed. As *W. A.* never took possession of the premises, all that he acquired was a mere right of entry. (2 *Caines's Rep.* 67. 2 *Salik.* 563.)

2. Will the court intend that the judgment was regularly revived against every person? It was revived on two *nihils* returned to the *scire facias*, without naming any of the heirs or terre-tenants, or giving notice to any one. This appears from the record which is referred to in the case. No person can be disturbed in his possession, without notice.

3. The sale by the sheriff was irregular. He ought to have sold the land in separate and distinct parcels. There were seven distinct farms, occupied by as many tenants. Many persons would bid for one farm, who would not be willing or able to purchase the whole. Selling the whole together, in mass, is ruinous to the debtor, and is a practice not to be tolerated. (13 *Johns. Rep.* 102. 14 *Johns. Rep.* 352. 1 *Johns. Ch. Rep.* 502. 2 *Caines*, 66. 11 *Johns. Rep.* 373.)

4. Admitting, however, that the proceedings under the *scire facias*, and by the sheriff, were regular, yet the lessors of the plaintiff are bound by the statute of limitations. A purchaser under a judgment can be in no better situation than the person under whom he claims, when the statute of limitations has once begun to run. More than 21 years have elapsed since the deed from *Church* to *Newton*.

Sudam, contra. 1. The defendant knew that the property was advertised for sale, and might have applied to this court to set aside the judgment, or to the Court of Chancery for an injunction to prevent the sale. He now comes too late, after a third person has become the purchaser.

2. The court, in the cases cited, decided that the deed *was void, for the uncertainty of the description; not that the description, by the number of the lot in a particular patent, was not sufficient. On the contrary, it has been repeatedly decided that such a description was sufficient. (1 *Caines*, 493. 1 *Johns. Rep.* 444. 2 *Johns. Rep.* 40. 5 *Johns. Rep.* 500, 501. 7 *Johns. Rep.* 252. 8 *Johns. Rep.* 220. 479.) If the doctrine contended for by the defendant was to prevail, more than half of the sales by sheriffs would be overturned. The deed on the face of it is regular and valid, and is not to be avoided by parol evidence.

3. Again; this objection comes too late. The defendant should have applied to the court to set aside the sale. He cannot now make that objection, by way of defence, in an action brought by a *bona fide* purchaser.

4. The statute of limitations did not commence to run until *Newton* went into possession on the 26th of *May*, 1799, under a deed from *Church*. Before that time, he had no title, and his possession must be deemed to be that of *Church*, or the person having title. Though he may have had a good right to a deed, yet until he obtained a conveyance, his possession was that of the legal owner.

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Cady, in reply, said, that though the sheriff's deed for the whole lot was, *prima facie*, good; yet when it was shown that he had sold the whole, consisting of seven distinct farms, it was not good. This was a fact which did not appear on the face of the deed, and may be proved by parol.

Again; when *Newton* entered on the land in 1797, claiming it as his own, he held a possession adverse to all the world, and it is from that time the statute commenced. In *Jackson, ex dem. Roosevelt, v. Wheat*, decided in *May* term, (*ante*, 40.) the court held, that if the party entered into possession under claim or color of right, whether his title was good or not, the possession was adverse. If he has a deed, he is not bound to produce it, and may rely on his adverse possession.

SPENCER, Ch. J., delivered the opinion of the court. An adverse possession in this case, for more than 20 years before *the commencement of the suit, forms a decisive objection to the plaintiff's recovery.

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Timothy Church, who is admitted to have been the owner of lot No. 47, and under whom both parties claim, on the 19th of *February*, 1798, gave what was considered by him and *Joshua Newton*, the grantee, a good and valid deed for the premises, being 100 acres of lot No. 47. *Newton* went into possession of this land in 1797, and sowed his first crop; and although he appears to contradict himself, as to the time when he first took possession, two other witnesses prove that his first clearings were made in 1797. There can be no pretence that the deed was antedated. *Joshua Newton* states, that he has no reason to suppose the deed was antedated, or that *Timothy Church* was not there when it was executed. He says the deed was signed, and allowed by the parties to be sealed; as I understand him, the parties considered it to be sealed. He executed a mortgage to *Eleazer Church*, to secure part of the consideration money, which was subsequently paid, and the mortgage was destroyed. He further states, that he and those claiming under him have been in peaceable possession ever since. It appears that the defendants are *bona fide* purchasers, for valuable consideration, under *Joshua Newton*.

This suit was brought at the *May* term of this court in 1818, so that there has been more than 20 years' possession, since *Joshua Newton* first took possession, and more than 20 years since the deed was given to him by *Timothy Church*.

To obviate the effect of the statute, the plaintiff seems to rely on the defect in the deed from *Timothy Church* to *J. Newton*, in this, that it had not a seal, but a mere scrawl with a pen and ink for a seal; that *J. Newton* admitted the validity of the title of the *Andersons*, and that thus he and those who held under him, cannot now set up the possession under it as adverse.

With respect to the want of a seal to the deed when it was
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executed, although that fact has been submitted to a jury, who have found, in conformity to the opinion of the presiding judge, that there was no seal originally to the deed, I must say, that I should hardly have been of that opinion; but in the point of view we are now considering the case, it is immaterial, *whether the instrument was sealed or not. Had there been a seal, the title of *Joshua Newton* would have been perfect without a possession, and in that light only is it material. In *Jackson, e. d. Roosevelt, v. Wheat,*) we decided, upon the authority of several prior cases there referred to, that to constitute an adverse possession, it was only necessary that it should have been under claim and color of title. We said the defendant was under no necessity of producing the deed under which his grantor claimed title, though called for by the plaintiff. Suppose (we said) the deed had been lost, or when produced was found to be defective, that could not have destroyed the effect of the defendant's possession; and we referred to repeated decisions, that a continued possession for twenty years under claim of right, ripens into a right of possession which will toll an entry; and again, that it never had been considered necessary to constitute an adverse possession, that there should be a rightful title. Whenever this defence is set up, the idea of such a title is excluded; the fact of possession, and the *quo animo* it was commenced and continued, are the only tests.

It is true, that *Hyde* expressed his doubts of the validity of *J. Newton's* deed. *Hovey* did the same; but he advised him to stick to his deed, and not produce it, but insist upon holding the land under it; and this advice he pursued. There is no pretence for saying that he ever abandoned his claim under the deed. The only evidence of *Joshua Newton's* recognition of *Anderson's* title is this: *J. Newton* states, "that feeling squeamish about his title, he went to *Schenectady*, several times, to purchase *William Anderson's* right, or to sell; and the last time, being informed that *A.* was dead, he inquired of an attorney, how he could buy *Anderson's* title, and was told he must wait for the heirs to grow up."

A mere unexecuted intention of either *buying or selling*, from apprehension that a title may be defective, is neither an abandonment of the right and interest actually possessed, nor is it a recognition of a superior right residing in another person; and the only fair inference is, that to quiet and make his title perfectly secure, he would have bought in *Anderson's* claim, or sold his to him, could they have agreed on *the terms. It is absurd to consider this as interrupting *J. Newton's* possession, or as diminishing, in the smallest degree, his claim of title.

The idea was thrown out that *J. Newton's* possession commenced its adverse character when the *Andersons* purchased, and that being within 20 years of the commencement of the suit, the plaintiff is not barred. This position is not tenable. The

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Anderson title was derived from *Timothy Church*, and when the deed was given to *Newton*, in *February*, 1798, and possession taken, it was adverse to all the world. The purchase by the *Andersons* forms no epoch, from whence we are to date the commencement of *J. Newton's* adverse possession. It was adverse to them and to *T. Church* himself, after his giving the deed.

The sale by the sheriff was of specific farms, and lots of land together. I cannot entertain a doubt, but that the court would have set aside the sale, as to the lots, upon a direct application, at the instance of *W. Anderson's* representatives, could they have shown that lot No. 47. was held in distinct parcels by different persons. Sales in mass of real estate, held in several parcels, are not to be countenanced or tolerated. They are oppressive and unnecessary; and for the reasons given by this court, in 13 *Johns. Rep.* 102. 1 *Binney*, 61. and 1 *Johns. Ch. Rep.* 502. they deserve animadversion. In this case, there is no evidence of actual fraud; and as the sale has been acquiesced in so long, it is not necessary to the decision of the cause to consider whether it is void. For the same reasons, we forbear expressing any opinion as to the objections to the revival of the judgment by *scire facias*.

Judgment for the defendants.

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*BEALS against ALLEN.

A special agent has no authority to bind his principal, by any act, not within the scope of his authority.

B. sold goods to *L.* on a credit, and before the term of credit expired, apprehending the insolvency of *L.*, applied, on the 3d of *October*, 1817, for payment or security; and *C.*, a clerk of *L.*, employed in a store at *G.* to keep the books and accounts, and to sell goods by retail to customers, in the absence of *L.* gave an order

TRESPASS for seizing, taking, and carrying away certain goods of the plaintiff, tried at the *Ontario* circuit, in 1819, before Mr. Justice *Platt*.

On the 3d of *October*, 1817, the plaintiff, who resided at *Canandaigua*, sent his clerk, *James Byrnes*, to *Pultneyville*, to obtain payment or security for a demand against *Thomas Lowthrop*, for goods sold to him. *Byrnes* had a letter from *James Grieve*, the principal clerk of *Lowthrop*, at *Geneva*, *L.* being then absent, to *James Dey*, the acting clerk of *L.* at *Pultneyville*, which contained directions to *Dey* to deliver to *B.* the goods which *Lowthrop* had purchased of the plaintiff, if they were not sold, and if the whole or any part of them were sold, to make up the amount out of other goods, in the store of *L.* at *P.* The demand of the plaintiff amounted to 744 dollars and 12 cents, for goods sold to *L.* on a credit, \$20 dollars of which was to be paid on the 15th of *October*, 311 dollars and 62 cents on the 6th of *November*, 1817, and the residue on the 6th of *January* following. *Dey*, to whom the letter was delivered, at first refused to deliver the goods, or to do any thing on the subject. But, after taking some advice, he delivered

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goods to *B.* to the amount of 784 dollars, the greater part of which consisted of goods previously sold by the plaintiff to *L.* and which remained unpacked; and *Dey* agreed to come to *Canandaigua*, *and receive the difference between that amount, and the plaintiff's demand. The goods, while in a wagon, on their way to the plaintiff at *C.*, were seized by the deputy of the defendant, who was sheriff of the county of *Ontario*, at *Williamson*, by virtue of two executions of *Thomas Morris* against *Louthrop* and one *William Lilly*.

The defendant justified the taking of the goods, as sheriff of *Ontario*, under two judgments in favor of *Thomas Morris*, one docketed the 2d *May*, 1814, against *Louthrop & Lilly*, for 20,000 dollars debt, and 14 dollars 32 cents costs, and the other docketed the 13th *July*, 1816, against the same defendants, for 18,000 dollars debt, and 13 dollars 68 cents costs, and the executions issued on those judgments. The first execution was returnable the first day of *November*, 1817, and the defendant was directed to levy thereon, 1,817 dollars and 63 cents, with interest from the 27th *September*, 1817, and was received by him, *Sept.* 27, 1817. The second execution was delivered to the defendant on the 24th *September*, 1817, on which the defendant was directed to levy 10,000 dollars debt, 16 dollars and 49 cents costs, with interest from the 13th *July*, 1816. The goods in question were taken, by virtue of these executions, at *W.* on their way from *P.* It appeared from the evidence, of *Byrnes*, that he was sent to obtain the goods, in consequence of the plaintiff hearing that *L.* was in failing circumstances. The account of them was kept by *D.* on slips of paper, and no regular bill of sale of them was made out until after the seizure, when a bill was made, in the usual form, for goods sold and delivered to the plaintiff. The defendant also gave in evidence a judgment in favor of *John Dey* and *Elias Kane*, against *L.* for 32,000 dollars debt, and 14 dollars 43 cents costs, docketed 3d *August*, 1816, and an execution thereon, tested the 20th *October*, 1817, returnable in *January*, which was received by the defendant, the 28th *October*, 1817.

W. Kibbe, a witness for the plaintiff, testified that he attended the sale of the goods by the sheriff, as the agent of the plaintiff, on the 12th *November*, 1817, and forbade the sale; that the defendant stated that he had seized the goods on the two first executions, but they had been withdrawn, having been issued irregularly, or for some other reason; and *that he should sell the goods under the third execution. That after the sale, the sheriff said that he had sold the goods under the last execution. The defendant produced written instructions from the attorney of *Thomas Morris* to the sheriff, dated *November* 6, 1817, that the first execution having issued irregularly, he was to consider it as void, and discharge the lien on the property of the defendant. *Dey* testified, that

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on *D.* another clerk of *L.* at *P.* to deliver goods to *L.* to the amount of his demand; and *B.* accordingly received the amount, partly in the same goods which he had before sold to *L.* and partly in other goods. An execution on a judgment against *L.* in favor of *M.* was delivered to the sheriff on the 24th of *September*, 1817, and an execution on a judgment against *L.* in favor of *K.* on the 28th of *October*, and the sheriff seized the goods in the hands of *B.* and sold and applied them on the last execution.

In an action of trespass, &c. brought by *H.* against the sheriff, held, that *C.* the clerk of *L.* had no authority to deliver the goods to *B.*, and although it did not appear that *L.* had ever disaffirmed the act of *C.* and a stranger could not object to his want of authority, yet the sheriff, acting

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in behalf of the judgment creditors, who were interested, was not to be considered in that light, and might insist that the property was not changed by

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the delivery of
the goods to
B. for want of
authority in C.

The goods
of the debtor
are bound by
the delivery of
an execution
against him, to
the sheriff,
whether they
are actually
levied upon or
not, and a sub-
sequent sale of
them by the
debtor is void.
(*Ante*, p. 311.)

When two
several execu-
tions are deliv-
ered to a sher-
iff at different
times at the
suit of different
plaintiffs, a-
gainst the same
defendant, and
the sheriff takes
and sells the
goods of the
defendant, and
applies the pro-
ceeds in satis-
faction of the

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last execution,
leaving the other
unsatisfied,
though he is ac-
countable to
the plaintiff in
the first execu-
tion, for having
so sold and mis-
applied the
property to the
last execution;
yet a third cred-
itor, who had
gpt possession of
the goods sub-
sequent to the
delivery of the
first execution,
but prior to the
second, cannot
avail himself of
the act of the
sheriff in selling
under the last
execution, in-
stead of the
first; or call in
question the

when he let *Byrnes* have the goods, it was agreed that they should be kept by the plaintiff, unopened, until *Lowthrop* returned from *New-York*, where he had gone, and if he approved of the transaction, the sale was to be absolute, but not otherwise. This was denied by the witness *Byrnes*, who testified that the sale was absolute and unconditional. It was proved that *Grieve*, who gave the order to *Dey*, to deliver the goods to *B.* the agent of the plaintiff, was a clerk employed temporarily by *L.*, to keep his books and accounts, and to sell and retail goods to customers, and had no order to sell goods by the quantity, or to deliver goods or other effects, in payment or security for debt. The sheriff sold real estate of *L.* under the second execution, to the amount of 1500 dollars. On the third execution, the defendant levied 2,528 dollars and 58 cents.

The judge charged the jury, that as the sale of the goods was made by *Lowthrop's* clerk, to secure a *bona fide* debt to the plaintiff; and as it had been proved by the defendant's own confession, that the sale of the goods was made under the last execution, and the proceeds applied upon it, the defendant had failed in his justification, and the plaintiff was, therefore, entitled to recover. The jury found a verdict for the plaintiff, accordingly, for 784 dollars and 12 cents.

A motion was made to set aside the verdict, and for a new trial.

Henry, for the defendant.

Oakley, (Attorney General,) contra.

SPENCER, Ch. J., delivered the opinion of the court. *This case gives rise to three questions: 1. Whether the delivery of the goods to the plaintiff's agent was an authorized act, and changed the property.

2. Whether the second execution in favor of *Morris* was a subsisting one; and if so, then,

3. Whether the sale of the goods by the defendant, though the proceeds were applied toward satisfying an execution received subsequent to the sale and delivery of the goods to the plaintiff, was justifiable and legal.

I am of opinion, that the law was laid down incorrectly to the jury. *Dey* was merely a temporary clerk, and acted entirely under the instructions given to him by *Grieve*. At first he refused, altogether, to act, but on receiving advice, conformed to those instructions. *Grieve* has stated the extent of his authority, as *Lowthrop's* agent. He was a clerk in his store at *Geneva*, to keep his accounts and books, and to sell and retail his goods to his customers. He had no authority to sell goods by the quantity, or to deliver goods in payment, or security for debts. The transaction between *Dey* and the plaintiff's agent, can never be considered an ordinary sale

and delivery of goods. The plaintiff did not apply to *Grieve* as a purchaser of goods. He stated, that he had sold goods to *Lowthrop*, and that he was informed executions had been, or were about to be, put into the hands of the sheriff. He applied to get security for his debt, which he was willing to take in the goods he had sold, as far as they would go, and the balance in other goods. The position laid down by *Comyn*, (1 *Com. on Con.* 240.) is fully warranted by the cases: "There is a wide distinction," he says, "between a general and a particular agent. A general agent, as a factor for a merchant residing abroad, binds his principal by his acts; but an agent constituted for a particular purpose, and under a limited and circumscribed authority, cannot bind the principal by any act in which he exceeds his authority." (3 *Term Rep.* 757. 1 *Esp. N. P. Rep.* 111.) It is, indeed, an elementary principle, that no man can be bound by the act of another in relation to his property, unless he has deputed him to act for him; nor can he be bound then, if his agent acts beyond the scope of his authority. This is the general *principle. There are exceptions to it, but these exceptions do not touch the present case. The only possible ground on which the transfer of the goods to the plaintiff, in satisfaction of a debt not then due, can be upheld, is that there is no evidence that *Lowthrop* disaffirmed the act. But I cannot think, that his silence can alter the effect of the act. A stranger, it is true, could not take the objection; but the defendant is not to be viewed in that light. He acts for, and in behalf of, the judgment creditors, and they have an interest in questioning the acts of *Lowthrop's* agents. If there was a defect of power in those agents to convey the goods to the plaintiff, the defendant, as representing the rights of the creditors, has a right to say, that there was no change of property.

It appears to me, that *Kibbe* must have been mistaken in saying, that the sheriff informed him, that both the first and second executions had been withdrawn. The first certainly was; but it was shown, that the second had not been withdrawn, and that, in *January*, 1818, *Lowthrop's* real property was sold under it. By this execution, the defendant was directed to levy 10,000 dollars debt, and 16 dollars and 45 cents costs, and interest from the 13th of *July*, 1816, and it was received by the sheriff on the 24th of *September*, 1817.

These goods, then, were clearly bound by the execution, so that a sale of them by *Lowthrop* himself would not have divested the sheriff's right to take them. The goods were bound by this execution from the time it was put into the defendant's hands,† which was prior to the sale and delivery to the plaintiff. It was not necessary that the goods should have been levied upon, to prevent the effect of the sale, or to authorize the sheriff to take them in the manner he did.

The learned judge was, in my apprehension, incorrect, in

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regularity of the
sale. (a)

(a) Vide *Marsh*
v. *Lawrence*, 4
Conn. Rep. 464.
2 *Conn. Stat.* 366
§ 14.

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† Vide *Lambert*
v. *Paulding*
Ante, p. 311.

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considering the defendant as having failed in his justification, because the sale was under the last execution. The defendant had a right to sell under the second execution. In the case of *Sandford v. Roosa*, (12 *Johns. Rep.* 162.) it was decided, that if a sheriff sell under an execution last delivered, the sale is good; but the party who delivered the *prior execution has his remedy against the sheriff. In the present case, *Morris's* second execution has not been satisfied; and it is a question between him and the defendant, whether the latter incorrectly sold on the junior execution. The defendant having a right to take the goods where he did; having, also, a right to sell them on the second execution, it totally negatives the plaintiff's right to call his acts in question, for selling and applying the moneys on the junior execution. How the sale took place, and how the money was applied, were matters with which the plaintiff had no concern. It is enough for the defendant, that he possessed the legal right to take and sell the goods. It would operate severely, indeed, on the defendant, if he was to be liable both to *Morris* and the plaintiff.

A new trial must be granted, with costs to abide the event of the suit.

JACKSON, *ex dem.* HERKIMER and Wife, *against*
BILLINGER.

H. by his will, dated April 5, 1771, devised as follows: "my will and pleasure is, that my son John shall have the farm which I now live upon, &c.

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two of the best negroes, all my wearing apparel, three geldings, &c. But if my said son may happen to die unmarried, without lawful issue, then it is my will and pleasure, that the said estate shall descend to my next heir of the name of *H.* and that he may not sell, exchange, or dispose of any part of said estate,

EJECTMENT for land, in *German Flats*, in the county of *Herkimer Hanjost Herkimer*, the elder, being seised of the premises in question, made his will, on the 5th April, 1771. After declaring that his wife should remain "sole and absolute mistress of whatever estate he might die possessed, both real and personal, during her natural life," he devised as follows: "my will and pleasure is, that my son John shall have the farm which I now live upon, together *with one hundred acres adjoining thereto, in the new patent;" (together with some articles of personal property specified, viz. wearing apparel, horses, negroes, &c.) "but if my said son may happen to die unmarried or without lawful issue, then it is my will and pleasure that the said estate shall descend to my next heir of the name of *Herkimer*; and that he may not sell, exchange, or dispose of any part of said estate, without the consent, approbation, or concurrence of my executors." After some other directions, the testator appointed his sons *Nicholas, Henry and Jost*, executors. The testator died seised of the premises in August, 1775. The ejectment was brought for the farm on which the testator lived, and the one hundred acres adjoining, devised to his son John. *Catharine*, the wife, died soon after the testator. His son John died April 20, 1817, without issue, never having

been married. The testator, at his death, left five sons and eight daughters. *Nicholas*, the eldest son, died in *August*, 1777, without issue. *Henry*, the second son, died in *August*, 1779, leaving *Honjost*, one of the lessors of the plaintiff, his son and heir at law, born the 1st *October*, 1751. *Jost*, the third son, was attainted under the act of *October*, 1779, and removed to *Canada*, where he died in 1787, leaving seven children, four of whom died previous to *April*, 1817, one without issue, and three leaving issue. *George* died in 1786, leaving seven children who are still living. *Elizabeth Barbara*, the eldest daughter, married *David Schuyler*, and died in 1800, leaving *Catharine*, one of the lessors of the plaintiff, and four other children, one of whom died previous to *April*, 1817, leaving lawful issue, who are still living. *Lana*, *Delia Catharine*, *Anna*, and *Nancy*, other daughters of the testator, all died before *April*, 1817, leaving issue. *Elizabeth*, the sixth daughter, married *Hendrick Frey*, and is now living, being the only child of the testator that survived *John*, the devisee above named.

The cause was submitted to the opinion of the court, on a case containing the above facts; and it was agreed that if the court should be of opinion, that the plaintiff was entitled to recover the whole of the premises in question, then the defendant should give a *cognovit actionem* for the same; but if the court should be of opinion that the plaintiff was entitled *to recover only an undivided share, then the defendant should give a *cognovit actionem* for such share as the court shall adjudge under the demises laid in the declaration.

Talcot, for the plaintiff. No particular estate is expressly limited, by any appropriate description, to the testator's son *John*; nor is any estate expressly given to his issue; and if it were not for the words, "if he shall die without lawful issue," he would take only a life estate. Admitting that it was the testator's intention to provide for the issue of *John*, yet it is not necessary, in order to carry that intention into effect, to maintain that he took a *vested estate tail*. That intention may be effectuated by holding, 1. that *John* took a fee determinable upon the contingency of his dying without issue living, at the time of his death; or, 2. that he had an estate for life, to become an estate tail, upon the contingency of his leaving issue at his death.

1. We shall contend that *John* did not take a vested estate tail, because the remainder over is not limited upon an indefinite failure of issue, but upon the event of his dying without issue, at the time of his death. If there had been an express devise in tail and remainder over, it would have made no difference in *John's* estate, to have added, afterwards, that in case he die without issue living at the time of his death, the estate should go to the remainder man, for it is no more than the law

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without the consent, approbation, and concurrence of my executors."

The testator died in *August*, 1775, leaving five sons and eight daughters. *John*, the devisee, died *April* 20, 1817, unmarried, and without issue, leaving one sister, and nephews and nieces living: *Held*, that *John*, the devisee, took an estate tail by implication; and that the devise over, depending on an indefinite failure of issue, was not good

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as an executory devise: and that the estate tail, being converted into an estate in fee simple, by the statute, (1 N. R. L. 52. 1 Rev. Stat. 722. § 3.) it descended, on the death of *John*, to his heirs at law, according to the statute regulating descents. (u)

(a) Vide *Lion ex dem. Eden v. Bartie*, 30 Johns. Rep. 485. 2 Cow Rep. 333.

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implies, in every case of an estate tail with a remainder. But where the estate devised is, *by implication*, to be changed from what it would otherwise be, into an *estate tail*, from the effect of the words, "dying without issue," or any similar expression, and a subsequent limitation over, then it becomes necessary to determine whether the limitation over is upon an *indefinite*, or a *definite* failure of issue. In the first case, if the devisee is in being and ascertained, it will be a vested estate tail; in the second case, it will be otherwise. There are many cases in the books which illustrate this distinction. (*Pell v. Brown*, Cro. Jac. 590. *Porter v. Bradley*, 3 Term Rep. 143. *Roe v. Jeffrey*, 7 Term Rep. 589. *Doe v. Ellis*, 9 East, 382. *Tenny v. Agar*, 12 East, 262. *per Bayley, J.* *Doe v. Webber*, 1 Barnet-wall and Ald. Rep. 713. *Fosdick v. *Cornell*, 1 Johns. Rep. 440. *Executors of Moffat v. Strong*, 10 Johns. Rep. 12. *Jackson v. Staats*, 11 Johns. Rep. 337. *Anderson v. Jackson*, in error, 16 Johns. Rep. 382.)

So, where it is attempted to change an estate for life into an estate tail, or a fee, as in *Plunket v. Holmes*, (1 Lev. 11. T. Raym. 28.) where one devised to T. his eldest son, for life, and if T. should die without issue living at his death, then to L. another of the testator's sons, in fee; it was resolved that T. was tenant for life only. "Because," says Mr. *Fearne*, (*on Cont. Rem. &c.* 341.) "the limitation over was not upon a dying without issue generally, but was confined to a dying without issue then living." So, in the case of a devise to a son for life, and after his death, if he died without issue *then living*, to a daughter, the son takes only an estate for life (3 Com. Dig. 431, *Devise* (N. 6.) Vent. 231.) In *Leithi eullier v. Tracy*, (3 Atk. 784.) the question was, whether Mrs T. by the words in Sir W. D's. will, "in case my daughter shall depart this life without issue of her body living at her decease," took an estate tail by implication; and Lord *Hardwicke* held, that she did not. "It is certainly true," says he, "that there are several cases in law, where the words, if he die without issue, have been held to vest an estate tail by implication. But there is no case comes up to this."

These cases show, that where the estate in fee or for life, is first limited by appropriate words, that the words "die without issue," will not change it into an estate tail, unless they refer to an indefinite failure of issue.

The same rule holds where there are no words in the devise, specifically describing or limiting, in the first instance, any particular estate to the devisee, as is the case now before the court. In *Richardson v. Noyes*, (2 Mass. Rep. 56.) where the words were, "if either of my said sons should die without children, the survivor, or survivors, to hold the share of each, or any of them, dying without children;" *Sedgwick, J.*, who delivered the opinion of the court, says, "If, by the devise to the survivor, or survivors, the testator meant, that he or they

should take whenever there should be an indefinite failure of issue, however distant that period might be, then he intended a fee tail; and if, by this expression, *he contemplated events which were to take place in the life of the devisees, then he did not intend a fee tail." So, where there is no devise of any estate but by implication. (*Daintry v. Daintry*, 6 Term Rep. 307.)

We shall contend, that the words of the testator, in the present case, show, that he meant a *definite* failure of issue. In *Brigge v. Bensley*, (1 Bro. C. C. 187.) Lord Thurlow says, "that the general sense of dying without issue, is at the time of the death; this is the grammatical construction, and is the sense, in general, of those who use the words." The same thing has been repeated by a succession of *English* judges. In *Pinbury v. Elkin*, (1 P. Wms. 565.) Lord Ch. J. Parker says, the "words, die without issue, are relative to the death of the party, that being the natural meaning of the words." It is strange, therefore, that they should have been construed in a different manner in a devise where the *intent* of the testator is said to be the polar star to guide us to the true construction. The *English* doctrine, upholding a different construction, seems well to deserve the severe reprobation of Chief Justice Wilmot, in *Keilly v. Fowler*, (cited 16 Johns. Rep. 387.) It cannot be, that the courts have adopted this doctrine, on the ground that it was the intent to provide for the issue of the devisor indefinitely, and for the remainder man, whenever that issue should fail; and that to effectuate *that intent*, the words were to be understood in a different sense from that in which the testator understood them; for there are numerous cases in the *English* books to show, that if there are *other circumstances* in the will, denoting that the testator meant a definite failure of issue, that it shall then be so held, as well in cases of the limitation of *real*, as of personal property, and the courts are eager to lay hold of such circumstances. It seems absurd to say, "we admit," (as Lord Thurlow did,) "that the natural sense of the words, the grammatical construction of them, and the meaning of those who use them, is a definite failure of issue, and yet we will not believe that to be the meaning, unless you prove it by other parts of the will." As *Brackenridge, J.*, in *Holmes v. Holmes*, (5 Binney Rep. 264.) observed, "doubtless, the *English* judges will tell you, that words may be construed otherwise *than they mean; that though you may hear or see without rule, you cannot understand without rule, and you must submit to the rule of construction, let you think what you will of the intention." But whatever may be the doctrine in *England*, the courts of this country, and of this state especially, have ventured to free the law from such absurdities. (1 Johns. Rep. 439. 3 Johns. Rep. 292. 11 Johns. Rep. 337. 16 Johns. Rep. 382.) The cases decided here, establish the true rule of construction, that the *legal* meaning

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of the words, "die without issue," is the same as the natural meaning of them; and this they have done upon the sound principles of common sense; for, as Lord *Ellenborough* observed, "there is a rule of common sense as strong as any rule, that the words of the will are to be construed according to the natural meaning, unless some obvious incongruity would result from so construing them." It is true, that in the cases decided in this court, there were peculiar circumstances which might be called in aid of the natural meaning of the words. But, in *Anderson v. Jackson*, the Court of Errors, according to the opinion delivered by *Yates*, Senator, did not rely upon these circumstances. They put the case on the broad principle, that dying without issue meant dying without issue living at the death of the devisee. In *Hoge v. Hoge*, (1 *Serg. & Rawle's Rep.* 144.) Ch. J. *Tilghman* says, "the most simple and natural meaning of dying without leaving issue, is leaving issue at the time of the devisee's death." Lord *Hardwicke* (3 *Atk.* 797.) says, that where the intention of the testator to create an estate tail is not plain, judges will lay hold of any circumstances, rather than put it in the power of a person to bar subsequent limitations. If, then, we are compelled to seek for other circumstances in the will, in aid of the natural meaning, before the court can say, that the natural meaning is that of the testator, we contend, that those circumstances exist in the present case. (1.) The devise over is of the *whole estate* given to *John*, to the next heir of the testator of the name of *Herkimer*; and this devise carries the *personal*, as well as the real estate. In *Richardson v. Noyes*, (2 *Mass. Rep.* 62, 63.) the court were of opinion, that this circumstance denoted that the testator did not *contemplate an indefinite failure of issue; because, that event might not take place in a century, when neither the negroes, or the tools of husbandry, &c. would be in existence. It is true, Chancellor *Kent*, in *Anderson v. Jackson*, apprehended that this decision, according to the *English law*, was a mistaken one, in not following the rule in *Forth v. Chapman*, making a distinction, as to the construction of the will, between the devise of the real, and the bequest of the personal property; though he had before said, in *Moffat v. Strong*, (10 *Johns. Rep.* 16.) that it would be hazardous to decide a case on that distinction. He seems, however, in *Anderson v. Jackson*, to suppose, that this distinction, which had been exploded by Lord *Kenyon*, in *Porter v. Bradley*, (3 *Term Rep.* 143.) had been restored by him in *Daintry v. Daintry*, (6 *Term Rep.* 307.) But the certificate in that case, sent to the master of the rolls, can only be supported upon the ground, that no such distinction exists. In *Roe v. Jeffrey* (7 *Term Rep.* 595.) Lord *Kenyon* said, that he was not prepared to unsay what he had said in *Porter v. Bradley*. Mr. *Fearne* (*Essay on Cont. Rem.* 483. 448. 6 ed.) remarks, that the nature of the chattels given over, on the dying without issue, (*viz.* cows and horses,) 288

was not suitable to the supposition of an indefinite failure of issue. (1 *Munf. Rep.* 549. 2 *Munf. Rep.* 479.)

(2.) Another circumstance: the words of the devise are, "if my said son may happen to die *unmarried*, or without *lawful issue*." This is equivalent to saying, if he shall have died, without having been married, or having been married, without having had issue by his wife. The testator must have contemplated the determination of the question as to his son's dying unmarried, and dying without lawful issue, to be made at one and the same time. As his dying unmarried could not refer to an indefinite time, but must be determined at the moment of his death, so neither could his dying without lawful issue, refer to an indefinite time. (*Rethowe v. Chappel*, cited *Cro. Jac.* 461.)

(3.) A third circumstance is: In the devise over to the next heir of the testator, after failure of the issue of *John*, the testator adds: "and he may not sell, exchange or dispose *of any part of the said estate, without the consent, approbation, or concurrence of my executors." Now, the testator cannot be supposed to have understood the technical rule of law, by which the executor of an executor may be called the executor of the testator; but must have referred to the executors named in his will. This is manifest from a subsequent clause in his will, by which he puts his wife, in case she becomes unsound of mind, under "the care of his said executors, *hereinafter named*." The testator must clearly have contemplated a limitation over to his next heir, upon a failure of issue during a life or lives in being, that is, his executors named; "otherwise," says *Fearne*, in his remarks on the case of *Keily v. Fowler*, (*Essay on Cont. Rem.* 485.) "we make him repose a trust in his executors, inconsistent with a probability of their living to perform it."

(4.) A fourth circumstance is, in the devise over; that "the said estate shall descend to the next heir of the testator, of the name of *Herkimer*." The word *estate* implies *interest* as well as *locality*. It means, here, not only the same *lands* which were devised to *John*, but the same *interest* which *John* had taken in them. The estate of the next heir could not be an *estate tail*, because if it were so, it would have been useless to add the clause, confining him to the approbation of executors, in the *sale* or *exchange* of the estate, for an estate tail cannot be sold or exchanged. (*Best, arguendo, Doe v. Witton*, 2 *Bos. & Pull.* 326.)

Thus we have shown, that a vested estate tail cannot arise by implication, on a definite failure of issue; that the testator did, in this case, contemplate a definite failure of issue; and, therefore, *John* did not, in this case, take a vested estate tail, with remainder over to the next heir of the devisor.

2. Then, we contend, that *John* took an estate *in fee* determinable upon the contingency of his dying without issue living

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at the time of his death, with a good executory devise over, upon that contingency, to the next heir of the testator. It will be said, that *John* must take an estate of *inheritance*, by implication, in order to provide for the issue. If so, then if it has been shown that it cannot be an estate tail, it follows, that it must be an estate in fee. Words which show *an intent that the devisee should have a greater estate than for life, and which do not limit an estate tail, make a fee. (3 *Comyn Dig* 422. 424. 2 *Mass. Rep.* 56.) Again; the *estate* to the next heir is a fee. In *Randall v. Tuchin*, (6 *Taunt.* 460.) *Heath*, J., says, "where the word *estate* is *operative*, it passes a *fee*; and the test to try whether it is *operative*, is to strike it out of the will." And applying this test to that case, he said, the "devise would be nonsense." Another reason for holding *John's* estate to be a fee, is, that the land is given by the same words as the *personal* property. (*Johnson v. Johnson*, 1 *Munf. Rep.* 549.)

3. But if the estate devised to *John*, was to become an estate tail, it was only to become such in his issue, upon the contingency of his *dying, leaving issue then living*. And as he died without issue then living, the estate has been nothing but an estate for life, from the beginning. In *Chadock v. Cowley*, (Cro. *Jac.* 695.) it was urged, that the devise should create an estate tail upon contingency; but the court said, that the words, that the survivor shall be heir to the other, if he die without issue; they seem to be an estate tail. But if the devise had been, if he die without issue in the life of the other, or before such an age, it should be a contingent devise in tail, if it should happen, and not otherwise; but being that the survivor shall be heir, &c. it is an estate tail immediately. The case of *Fountain v. Gooch*, (2 *Bac. Abr.* 59, 60.) may be supposed to contradict this, but, in that case, there was an estate tail expressly given in the first instance. The case of *Leithieullier v. Tracy*, (3 *Atk.* 784.) before cited, shows, that where the failure of issue is definite, it is an estate tail upon a contingency; and that under a devise like the present, upon a definite failure of issue, the issue may take by purchase. In this view of the case, the limitation over would be good, inasmuch, as it would only be the common case of a limitation over upon a contingency with a double aspect, and not a limitation of a contingent estate, to take effect after the expiration of a precedent contingent estate. The event of *John's* death, with or without issue, determined which estate was to take effect; whether it was to be taken by the issue of *John*, or the next heir of the testator.

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*If *John* did take a vested estate tail, the act abolishing estates tail has not destroyed the limitation over; and if it cannot take effect as a *remainder*, it shall take effect as an *executory devise*. In *Haven's Lessee v. Schultz*, (3 *Yeates's Rep.* 324.) *Shippen*, Ch. J., says, "it is no new thing to construe 290

limitations according to the event, in order to support the intention of the testator." In *Holmes v. Holmes*, (5 Binney, 260.) Yeates, J., observes, "it is generally true, that a devise shall stand as at the time of making the will, and shall not be construed by any after act, collateral contingency, or subsequent circumstance: but it is equally true that the rule is not universal." In *Pay's case*, (Cro. Eliz. 878.) there was a devise from *Michaelmas* term following, with a remainder over, and the testator died before *Michaelmas* term; and as it could not take effect as a remainder, it was held good as an executory devise. In *Hopkins v. Hopkins*, (Cases temp. Talbot, 44. 50, 51.) Lord Talbot cited *Pay's case*, and said, that "if a remainder, in its first creation, does, by any subsequent accident, become an executory devise, why should it not be good here, on the authority of that case?" In *Plunket v. Holmes*, (1 Lev. 11.) the course of argument taken by the court admits, that if the descent of the fee, in that case, had not merged the life estate, the remainder would have been an executory devise. So, in *Fortescue v. Abbott*, (2 Lev. 202.) the reversion descended to the eldest son, and so destroyed the contingent remainders to the other two sons; and it was held good by way of executory devise.

The next heir of the name of *Herkimer* is a sufficient *descriptio personæ*. The testator meant him that would be next heir of his name, as the law then stood. The time of the death of *John*, the devisee of the intermediate estate, was the time at which it was to be determined who was next heir, within the meaning of the devise. *Elizabeth*, the eldest daughter, having lost her name by marriage, could not take the estate under this devise, even if the issue of the sons had been extinct. (*Bon v. Smith*, Cro. Eliz. 532.) Besides, in restricting the power of the next heir to sell, &c. the testator uses the masculine pronoun, which could not refer to *Elizabeth*, nor any of his daughters.

**Cady*, contra. 1. *John*, the devisee, took an estate tail, by implication, which, by the statute abolishing entails, was converted into an estate in fee, and, on his death, descended to his sister. A devise to a person generally, without any words of limitation, which, of itself, would create only an estate for life, may be enlarged by subsequent words, or by implication, into an estate tail. (*Newton v. Bernardine, Moore*, 127.) The testator devised to his wife for life, and after to his son, and if he died without issue, having no son, another should have it; it was held, that the son took an estate in tail male. (*Robinson v. Miller*, 1 Roll. Abr. 837. Cruise Dig. tit. 38. ch. 12. s. 30. s. 40.)

2. The devise over, in case *John* died unmarried, and without issue, is void, as being too remote; and there are no words showing that the testator intended a dying without is-

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sue at the death of *John*, but a general failure of issue. The counsel for the plaintiff censures the doctrine of the *English* law on this subject; but it is the business of this court to expound the law as it was when this devise was made; not to make new law. It is unnecessary to cite all the cases on this point. They will all be found in the case of *Anderson v. Jackson, ex dem. Eden*, (16 *Johns Rep.* 382.) and we venture to say, that not a case is to be found in the *English* books, where these words have been used in a will, that they have not been construed to mean an indefinite failure of issue. Let the case of *Anderson v. Jackson* be understood as it may, it does not apply to the present case. The will here was made in 1771, before the statute *de donis* was abolished. In the case of *Jackson, ex dem. Eden, v. Anderson*, the will was made in 1798. The statute *de donis* was in force until the 1st of *May*, 1788, (2 *Greenl. Ed. Laws*, 116.) from which time, with all the *English* statutes, it ceased, by the act of the 27th of *February*, 1788, to have any operation here. That statute lies at the foundation of estates in tail; and if the devise in this case was of an estate tail, by the act of the 23d of *February*, 1786, (1 *N. R. L.* 52. sess. 9. ch. 12.) it was turned into an estate in fee, thereby saving the trouble of suffering a common recovery. The case of *Plunket v. Holmes*, (1 *Liv.* 11.) shows, that the devise over, in this case, is void, as being on an event too remote. According to the argument of the plaintiff's *counsel, the estate over was a contingent estate for life. The word estate, is used to denote the particular property devised, not the quantity of *interest*. The words "said estate," referred to the farm on which the testator lived, by way of description merely as to its locality. It is manifest from the language of the whole will, that the testator knew what was meant by an estate tail.

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3. The estate over, must take effect as a contingent remainder, and not as an executory devise. The devise over is to the next heir of the testator of the name of *Herkimer*. It is not to him and his heirs; there are no words of limitation used, showing, that the testator intended to give the devisee more than an estate for life, unless that intent is to be inferred from the word "descend," or the word "estate." The word "descend," as here used, can have no greater effect than the word devise, or the words *he shall have*; because a person claiming as devisee, cannot take by descent. It is true, that the word "estate" does, sometimes, pass a fee; but it must clearly appear, that it was used by the testator to denote all his interest in the land devised. (*Cruise's Dig. tit. 38. ch. 13. s. 35. s. 36.*) But the words "said estate," as has been already observed, have reference merely to the farm and 100 acres of land, as descriptive merely of the locality of the land. (*Rogers v. Briggs, And. Rep.* 210. *Cruise Dig. tit. 38. ch. 13. s. 37.*) The testator understood how to devise a fee, when it was his inten-

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tion to do so. In the last clause of the will, he uses apt words for that purpose. He says, "all the rest, residue, and remainder of my estate, both real and personal, after my wife's decease, I give, devise, and bequeath unto all my children, and to their heirs and assigns for ever." If the devise to his next heir of the name of *Herkimer*, did not pass a fee, then the remainder in fee is embraced in the residuary clause. The testator did not mean to die intestate as to any part of his estate. The whole was devised. No person can claim any part of it as his heir at law. No title can be made to it, but under the will, or as heir to some one of the devisees. Then was not the devise over a contingent remainder? "Whenever a future interest in land is so devised, as to fall within the rules laid down for *the limitation of contingent remainders, such devise shall be construed to be a contingent remainder, and not an executory devise." (*Cruise Dig. tit. 38, ch. 17. s. 11.*) Where the devise over, is after an estate tail, it is not an executory devise, but a contingent remainder. (*Cruise Dig. tit. 38. ch. 18. s. 8. 17. 29, 30, 31.* A remainder is contingent, when it is limited to take effect on an event which may never happen, or on a condition which may never be performed. (*Cruise Dig. tit. 16. ch. 1. s. 8, 9. s. 46. Doe v. Holmes, 2 Bl. Rep. 777.*)

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4. As the next heir of the name of *Herkimer* died in the life-time of *John*, the contingent remainder did not take effect. But this depends on the question, who was the person described as the next heir of the testator, by the name of *Herkimer*? The will speaks, as soon as the testator dies. Now, at the time of his death, the next heir of the name was *Nicholas*, the eldest son and heir at law, who was then living; but as he died in 1777, before *John*, the contingency never took effect, and so the devise over failed. Circumstances have been referred to, to show that the estate over was the same estate as that given to *John*, or an estate in fee. But the clause as to the concurrence of *executors* shows that the testator had in view his eldest son, *Nicholas*. (*Shep. Touchst. 418. 436.*)

If *John* took an estate for life only, then, by the last clause, the residue of the estate was devised to all the children, share and share alike. If the devise over, in the residuary clause, created a contingent remainder, then *Elizabeth*, the sixth daughter, who married *Henry Frey*, and was the only child of the testator living, at the death of *John*, takes the whole estate. If the residuary clause creates a vested remainder, then the lessor, *Honjost*, is entitled to one *twelfth* in his own right, and to one *forty-eighth* part, in right of his wife, who was the daughter of *Elizabeth*, the eldest daughter of the testator, and Mrs. *Frey* is entitled to *two twelfth* parts.

SPENCER, Ch. J., delivered the opinion of the court. The plaintiff claims to recover on the ground that he is the next heir of the testator, of the name of *Herkimer*, had the *rules of

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descent remained unaltered; and that the devise over, on the contingency of *John's* dying unmarried and without issue, operates as an executory devise. If he fails in establishing this construction, then he claims that both the lessors are entitled to portions of the estate as heirs of *John*, and this latter position is conceded.

On the part of the defendant, it is contended, that the devise to *John* created an estate tail in him, and that the devise over cannot, by the rules of law, take effect as an executory devise.

We must construe this will according to the state of things, and as it would have been construed, at the instant of the testator's death. (*Doug.* 477. *n.* 1. 1 *Ves.* 153. 3 *Burr.* 1570.) In my opinion, *John*, the testator's son, took an estate tail by implication. The devise over depended on an indefinite failure of issue, and, therefore, the contingency was too remote to avail as a limitation, in the nature of an executory devise. That an estate tail may be created by mere implication, without any express words of devise, is settled in a variety of cases. The authorities to support this position, are collected by *Cruise*, (title *Devise*, ch. 12. from *s.* 30 to 40.) and there is not a case to the contrary. If the implication be a necessary one, as I think it is in this case, it will defeat the heir at law of his estate in fee. *John* then took an estate in tail, unless the devise over can be supported as a good executory devise. It is an indisputable rule, that an executory devise must vest within the compass of a life or lives in being, and twenty-one years and a fraction after, otherwise it is too remote, and tends to create a perpetuity. Now, there is nothing in the will to show, that the testator meant that *John's* dying without issue, should be issue living at the time of his death; the contingency, therefore, in the view of the testator, depended on an indefinite failure of issue, and, consequently, was too remote an event to sustain the devise over, as an executory devise. *Fosdick & Cornell*, (1 *Johns. Rep.* 440.) and the several other cases decided in this court, and the case of *Jackson, ex dem. Eden, v. Anderson*, (16 *Johns. Rep.* 382.) in the Court of Errors, were all decided on the intention of the testator apparent in the will, that the devise over should take effect upon the death of the devisee, he dying without issue living, at the time of his death. In all these cases, the limitation over was to the survivor of persons *in esse*, when the will was made. In the present case, there is nothing to show that the testator intended the estate should vest in his next heir of the name of *Herkimer*, upon the death of *John*, if he died without issue living at that time; indeed, the testator had no idea who would be his next heir of the name of *Herkimer*, at the death of his son *John*.

This being the true construction of the will, the statute abolishing entails, (1 *R. L.* 52. 1 *Rev. Stat.* 722. §. 3.) converted

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the estate in tail, into a fee simple absolute, and thus *John* died seised in fee of the premises, and the estate descends according to the regulations of the statute of descents, and the lessors are entitled to their shares.

Judgment for the plaintiff accordingly.

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OVERSEERS of the POOR of NORWICH, against the OVERSEERS of the POOR of NEW-BERLIN.

IN ERROR to the Court of Common Pleas of *Chenango*. *Taylor* and *Medbury*, defendants in error, as overseers of the poor of the town of *New-Berlin*, brought an action of *assumpsit* against *Rouse* and *Thompson*, overseers of the poor of the town of *Norwich*, on a special contract, dated *July 3, 1808*, between the supervisors and the overseers of the poor of the two towns. By a statute passed the 3d of *April, 1807*, the old town of *Norwich* was divided, and a part thereof erected into a new town, by the name of *New-Berlin*. The *act contained the usual provision, "that the supervisors and overseers of the poor of the towns of *Norwich* and *New-Berlin* should meet together, and divide the money and poor belonging to the town of *Norwich* previous to the division thereof, according to the last tax list, and that each of the said towns should for ever thereafter respectively maintain its own poor." The supervisors and overseers of the poor of the two towns accordingly met, pursuant to notice for that purpose, and by written agreement determined, that there were six paupers of the old town of *N.*; and after dividing the poor money belonging to the town of *N.*, giving to the former 175 dollars and six cents, and to the new town 173 dollars and fifty cents, instead of dividing the poor, they agreed, as follows: "The poor found on the town of *Norwich*, the last *Tuesday of February*, consisted of *William Jones*, and his wife and four children, which we agree to support, in proportion, according to the division of the poor money between the two towns, according to the act in that case made and provided, each town respectively to pay the equal proportion according to the division of the moneys; these poor persons to be disposed of according to the best advantage, by the poor masters of the said towns, or of either of the said towns." This agreement was signed by the supervisors and overseers of the poor of the two towns then in office. It was proved at the trial, that the overseers of the poor of *New-Berlin*, since 1808, had expended 255 dollars, in maintaining *William Jones*, on which they charged 17 dollars interest, and 14 dollars for their services as overseers, amounting in the whole to 286 dollars and 64 cents. It appeared that the wife

An act for the division of a town, directed the supervisors and overseers of the poor of the two towns, to meet and divide the money and the poor belonging to the town so divided,

[* 383] according to the last tax list, and that each town thereafter should respectively maintain its own poor: and the supervisors and overseers of the two towns met accordingly, and divided the poor money between the two towns, and found six paupers in the old town, which they agreed should be maintained by the overseers of both towns, in equal proportion, according to the division of the money, and then the paupers to be disposed of by the poor masters of both or either of the towns, to the best advantage. In an action of *assumpsit* brought by the overseers of one of the towns, against the overseers of the

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other, on this agreement, for its proportion of the expense of supporting one of the pau-

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pers after the money so divided had been spent: *Held*, that the overseers, &c. in making this agreement, transcribed the powers given them by the act, and that, therefore, no action could be maintained upon it, admitting, even, that overseers of the poor may, as such, contract for the maintenance of the poor, so as to bind their successors in office.

and children of *W. Jones*, after the division, became no longer chargeable. The plaintiffs below claimed to recover of the defendants below, a part of the above sum, according to the ratio agreed upon between the supervisors and overseers of the two towns.

The defendants objected to the admission of the written agreement in evidence, on the ground that a special contract made by one set of overseers could not be given in evidence in an action against another set of overseers; but the court overruled the objection. The plaintiffs, also, offered in evidence several contracts and vouchers relative to the moneys expended by them in supporting the pauper, *to the competency of which the defendants objected; but the court admitted the evidence. The defendants below offered to prove that the pauper owned land in the town of *New-Berlin*. The plaintiffs objected to the evidence; but the court overruled the objection. A deed of conveyance of land to *Jones* was then read in evidence, the value of which land was about 1,000 dollars; but it did not appear whether *Jones* became the owner of the land before or after the division of the towns; the defendants proved that the wife and children of *Jones* maintained themselves on the land; but *Jones* himself was insane and a town charge. A bill of exceptions was tendered by the defendants to the opinion of the court below.

Jordan, for the plaintiffs in error, contended, that *Jones*, in fact, was not a pauper when the town of *Norwich* was divided; and after the division, he acquired a settlement in the town of *New-Berlin*. (*Overseers of Washington v. Overseers of Stanford*, 3 *Johns. Rep.* 193.)

Again; admitting that the overseers of the poor of *Norwich*, for the time being, were bound by the contract signed by them in 1808, that contract was not binding on their successors in office. The overseers of the poor are not a body corporate, so that their successors in office can be sued in their own names, on a contract made by their predecessors in office. (*Shear v. Overseers of Hillsdale*, 13 *Johns. Rep.* 496. *Jackson v. Cory*, 8 *Johns. Rep.* 385.)

There was no evidence to support the general counts in the declaration, for it was not proved that *Jones* was a pauper of *N.* and therefore, no promise to pay for his maintenance could be implied.

H. Bleeker, contra. The proceedings of the supervisors and overseers of the two towns, under the act of the 3d of *April*, 1807, by which they found that *William Jones* was a pauper, is conclusive. They were authorized and directed by the act to ascertain who were paupers of *N.* and divide the poor between the two towns. The pauper was a charge on the town. The agreement entered into was not a personal
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contract, nor for the benefit of the individuals who *signed it. The overseers of the poor, having the funds of the town in their hands, for the maintenance of the poor, are liable, as the representatives and agents of the town, in their official capacity. The overseers of the poor, when they leave their office, are required by law, to pay over the poor monies to their successors in office. The funds pass into the hands of their successors, who, if not properly a corporation, are, nevertheless, liable, in respect to the funds placed in their hands for this object. But we contend that the overseers of the poor are to be considered a corporation, *sub modo*. Collective bodies of men acting under one general description, though not incorporated, yet in regard to certain rights, duties or trusts conferred upon them, not in their natural capacity, but in their public or official character, may be considered so far corporations, as to have succession, and the capacity of suing and being sued, in the right of the office they hold, and as far as their trust is concerned, distinct from their capacities as private individuals. Instances of these *quasi* corporations are stated by Mr. Kyd, in the introduction to his treatise on the law of Corporations, (p. 9—19.) which are perfectly analogous to the present case, of public officers, known as overseers of the poor, who, *quoad* the funds entrusted to them for public purposes, must necessarily be deemed to have perpetual succession, and the power, therefore, of suing and being sued. Coke, (Co. Litt. 250 a.) says, "a corporation is a body to take in succession, framed (as to that capacity) by policy," &c. Blackstone, (1 Bl. Com. 472, 473.) after observing that the consent of the king, express or *implied*, is necessary to the erection of a corporation, mentions several sets of persons, as "churchwardens,"—"who, by common law, have ever been held corporations, *virtute officii*; and this incorporation is so inseparably annexed to their offices, that we cannot frame a complete legal idea of any of these persons, but we must have, also, an idea of a corporation, capable to transmit their rights to their successors, at the same time." A grant of goods to the churchwardens of a parish, by that name, is good, though it is otherwise of a grant of land to them. (Shep. Touch. 236. 1 Kyd on Corp. Intro. 30.) In the case of *Denton v. Jackson*, (2 Johns. Ch. Rep. 325.) the chancellor *considered it as settled, that persons may have corporate powers, *sub modo*, for certain specified purposes only; and he instanced the *loan officers* of a county, and the *supervisors* of a county, as being such corporations. So this court, in *Jackson, ex dem. Lynch, v. Hartwell*, (8 Johns. Rep. 422.) held that the *supervisors* of a county are a corporation for special purposes and with special powers, though they could not take a grant of land. There is a perfect analogy between these overseers and those various officers in *England*, who are regarded as *quasi* corporations; such as parsons, vicars, church wardens, &c. Lord

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Ellenborough, (11 *East*, 586.) said, that he considered all appeals against orders of removal, though technically carried on in the names of the churchwardens and overseers of the respective parishes, as, in substance and effect, the suits of the parishioners themselves, who are to contribute to the expense of maintaining the paupers; and that, therefore a parishioner could not be called upon by the adverse party to give evidence. (10 *East*, 402, 403.)

The fact of maintaining the pauper, and paying the money, was proved by the vouchers produced at the trial. The receipts were proved in the usual way. (*Phillips's Ex.* 170.)

PLATT, J., delivered the opinion of the court. I think there is no foundation for either of the exceptions taken at the trial.

The written agreement was specially declared on; and whether it was *obligatory* on the defendant below, or *not*, it was at least pertinent evidence under the general issue, and the exception to the relevancy of that agreement could properly be taken advantage of only by demurrer, or by motion in arrest of judgment. But the record is before us on the writ of error; and although the bill of exceptions was frivolous, yet the question fairly occurs, does the declaration show a right of action in the plaintiffs below?

Without entering into the general question, whether overseers of the poor, in their *official* character, may sue and be sued, I am of opinion, that the declaration is substantially defective.

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*The statute required the supervisors and overseers of the two towns, to "divide the money and poor" of the old town of *Norwich*, and expressly declared, that, "after the division, each of the towns shall maintain its own poor." Now it appears, that they divided the *money* only, and the six acknowledged paupers were not divided; on the contrary, those officers expressly agreed not to divide the paupers, but that they should be supported by the towns jointly, each contributing in proportion to their respective dividends of the money; and that "these poor persons be disposed of according to the best advantage, by the poor-masters of the said towns, or either of the said towns."

Admitting the general proposition contended for, by the plaintiffs below, that overseers of the poor may, within the scope of their office, contract for the maintenance of the poor, so as to bind their successors; yet I think it clear, that this contract was not within the sphere of their official duties, but expressly contrary to law. Instead of dividing the poor, in order that each town, by its own officers, might provide for its own paupers, the supervisors and overseers, in 1808, disobeyed the injunction of the statute; and, in effect, formed a partnership between the two towns, for the future support of these paupers, with the preposterous stipulation, that they

should "be disposed of" as the overseers of both towns, or *either* of the towns, deemed most advantageous. The law confines the charge and control of paupers, in every town, exclusively to the officers of the town to which the paupers belong. It is a power which cannot be delegated by the officers of one town, to those of another town, nor can it be exercised by the officers of several towns in common.

On this ground, therefore, (which was not touched in the argument,) I am of opinion that the judgment ought to be reversed.

Judgment reversed.

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***M'CHESNEY against LANSING.**

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IN ERROR to the Court of Common Pleas of *Rensselaer* county.

M'Chesney brought an action of trover for a quantity of hay, against *J. Lansing*, in a justice's court, and obtained a verdict for *thirty-five* dollars, on which a judgment was rendered by the justice. The defendant, pursuant to the statute, (sess. 41. ch. 94. s. 17, 18.) appealed to the Court of Common Pleas. To the declaration in that court, the defendant pleaded the general issue; and on the trial, a verdict was found for the defendant, on which the Court of Common Pleas gave judgment, and that the defendant recover against the plaintiff, thirty-two dollars and 27 cents costs. At the trial, the plaintiff gave in evidence the return of the justice of the proceedings in the cause before him, which stated the title of the cause, the demands of the parties, the issue joined, a trial by jury, the names of the jurors, the names of the witnesses sworn at the trial, the name of a witness offered and rejected, the verdict, and the judgment thereon. A constable, who had been sworn as a witness before the justice, was also sworn as a witness in the Court of C. P., and testified, that he levied on, and sold at public auction, the *hay*, as the property of *H.*, against whom he had an execution, and that *M'Chesney*, the plaintiff, was the purchaser. The plaintiff offered to prove the execution, and give it in evidence; but the counsel for the defendant objected, on the ground, that the execution had not been offered, or given in evidence in the Justice's Court. The Court of C. P. sustained the objection, and overruled **the* evidence. The plaintiff's counsel excepted to the opinion of the court. The jury, under the direction of the court, found a verdict for the defendant, with six cents costs.

On the return to the writ of error, the cause was submitted to the court without argument.

The *eighteenth* section of the act to extend the jurisdiction of Justices of the peace, passed the 10th of April, 1818, (sess. 41. ch. 94.) requires the justice, after an appeal has been made from his court to the court of common pleas, to return to that court the proceedings before him; and among other things, the names of the witnesses sworn and examined, and the names of those offered and rejected; *Held*, that by the word *witnesses* was intended, not merely *persons* called to testify and sworn, or rejected, in a technical sense, but *evidence*: and that, therefore, the justice

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must, in his return, state not only the names of the persons offered or sworn as *witnesses*, but the *documentary* or *written* evidence, admitted or offered, and

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rejected by him; otherwise, on the trial before the court of C. P., any documentary evidence not stated in the return, cannot be admitted; it being the intention of the act to confine the parties, after the appeal to that court, to the same issue, and the same evidence taken in the court below, excepting such evidence only as may have been offered, and improperly rejected by the justice.

nesses," in a technical sense, are persons sworn to testify, or offered to testify in a cause. But it is apparent, that the legislature, in the act under consideration, meant to use the expression in a more comprehensive sense, and as synonymous with evidence. The object of the statute is to confine the parties to the same evidence examined before the justice, with the single exception of testimony offered, and improperly excluded by the justice. We, accordingly, decided, in *Rawson v. Adams*, (17 Johns. Rep. 132.) that the parties were to be confined to the same issue, and witnesses not offered in the court below, could not be admitted. The admission of documentary evidence not offered in the Justice's Court, stands upon the same ground; for it may operate as a surprise upon the adverse party, and take him unawares. He may have omitted to adduce witnesses important to him, because the documentary evidence was not offered or given. It would contravene the spirit of the act to admit any evidence not given in the court below, or offered to be given there.

Judgment affirmed. (a)

(a) Vide *Flower v. Allen*, 5 Cowen's Rep. 657. *Breese v. Williams*, 20 Johns. Rep. 280. *Cowen v. Bush*, 3 Cowen's Rep. 343.

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*THE PEOPLE against SPRAKER and YATES, impleaded with EISENLORD.

According to the true construction of the act concerning sheriffs and their duty, &c. (1 N. R. L. 418. sess. 36. ch. 67. sect. 6. 2 R. v. Stat. 476. § 1.) if the sheriff neglects to return an execution, the plaintiff in the execution, or party aggrieved by such default, in order to entitle himself to have the bond given pursuant to the act, for the faithful performance of the office, put in suit against the sheriff and his sureties, must have previously recovered judgment against the

DEBT on a bond executed by the defendant, *Eisenlord*, the 14th March, 1816, conditioned for the faithful execution of the office of sheriff of the county of *Montgomery*. The defendants, S. and Y. who were sureties for E., cravedoyer of the bond and condition, and pleaded performance of the condition. The plaintiffs replied, stating that in August term, 1816, a writ of *fieri facias* issued out of this court, on a judgment recovered against *Thomas Conkling*, at the suit of *Richard Marvin*, for 275 dollars and 43 cents, and was delivered to *Eisenlord*, then sheriff of the county of *Montgomery*, on the 23d August, 1816, to be executed in due form of law; that after the return day of the execution, to wit, on the 15th March, 1817, a rule of this court was served on the said sheriff, requiring him to return the said writ within twenty days after service of the rule; and that the said sheriff having wholly neglected to obey the rule, a writ of attachment was, in August term, 1817, issued out of this court against him, directed to the coroner of the county of *Montgomery*, returnable at the next October term; that the said sheriff was duly attached by one of the coroners, who took a recognizance for the appearance of the said sheriff, at the return of the writ

of attachment, according to the form of the statute, &c. That the said sheriff did not appear at the *October* term according to the condition of his recognizance, but made default, and the court, therefore, ordered the said recognizance to be delivered over, to be prosecuted for the benefit of *Richard Marvin*, the plaintiff in the execution; that the recognizance was accordingly delivered over, and a suit commenced thereon, in which such proceedings were had, that in *May*, 1818, a judgment was rendered upon the recognizance against the said *Eisenlord*, *for 500 dollars debt, and 42 dollars and 30 cents damages and costs; upon which judgment a writ of *fiery facias* was issued, returnable at the next *August* term, and which was returned *nulla bona*, and the said judgment remains unsatisfied; that in *January* term, 1819, the court, according to the provisions of the statute in such case made and provided, ordered the said bond, in the said declaration mentioned, to be put in suit against the defendants, concluding with a verification, and praying judgment, &c.

To this replication the defendants demurred, and the plaintiff joined in demurrer.

Cady, in support of the demurrer. 1. The second section of the *act concerning sheriffs and their duty*, &c. (1 *N. R. L.* 418. *sess.* 36. *ch.* 67. 2 *Rev. Stat.* 476. § 1.) requires persons who are appointed sheriffs to give a bond to the people, with two sureties, for the faithful performance of the duties of their office. The sixth section declares: "That in case of any recovery, by any party aggrieved, against any sheriff, for any default or misconduct in his office, it shall be lawful for the Justices of the Supreme Court, on motion in open court, to order the bond so given by such sheriff to be put in suit against such sheriff or his sureties," &c. and when judgment is obtained on the bond, the court are required, on motion for that purpose, to direct so much money to be levied thereon, as shall be sufficient to pay the party the debt or damages so recovered with costs, and to be paid to such party aggrieved. Now, the plaintiffs, in their replication, have not shown what has been recovered by any party aggrieved, against the sheriff, for any default or misconduct in office, while the defendants were responsible for his conduct. The plaintiff, *Marvin*, instead of bringing an action against the sheriff for his default, has thought proper to proceed by attachment; and the recognizance taken thereon for his appearance having been forfeited, a judgment has been obtained, in the name of the people, for the amount of the recognizance. The attempt now is to make the defendants, who are sureties, liable for the amount of the judgment recovered on the recognizance: whereas, if the plaintiff *M.* had sued the sheriff for his default, and then this bond had been prosecuted *for his benefit, he would be entitled to levy no more than his original debt and the costs.

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directly, on such sheriff in an action against him, grounded default. It is not enough that the plaintiff has in proceeded by attachment against the sheriff for his default in not returning the execution, and that a judgment has been recovered in the name of the people, against the sheriff, on the recognizance given by him for his appearance, on the return of the attachment. For the statute is to be strictly construed in favor of the sureties, who are not to be held responsible beyond the very terms and scope of their undertaking. (a)

(a) Vide *The People v. Birdsell*, 20 *Johns. Rep.* 297. *The People v. Marthenson*, *Ibid* 300. *Ex parte Noble*, 2 *Coxs's Rep.* 590. *Lewis v. Ball*, 6 *Coxs's Rep.* 583. *Rhinslander v. Mather*, 5 *Wendell's Rep.* 102.

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The judgment stated in the replication was not recovered against *J. E.* as sheriff, for any default or misconduct in his office, but for the non-performance of the condition of a recognizance which he had entered into before the coroner to appear on the return of the attachment. The defendants were not sureties that the sheriff should fulfil the condition of every recognizance he might enter into. The plaintiff is entitled to no more than the damages which he has sustained by the default of the sheriff, in not returning the execution. If the plaintiff in the execution had sued the sheriff for the default, the damages would have been ascertained, and the sureties would have known for what they were responsible. An action on the case lies against a sheriff for negligence in not returning a writ. (1 *Comyn's Dig.* 291. *Action on the Case for Negligence*, A. 2.)

Conkling, contra. 1. It is now too late to object to the nature of the recovery against the sheriff, *E.* The objection should have been raised when the motion was made for leave to put the bond in suit.

2. But, admitting that the defendants are in season to raise the objection, the broad question is, whether, if the sheriff is proceeded against for his default in not returning a writ, in the ordinary mode, by attachment, and suit on his recognizance, the sureties are liable for the amount recovered against him? The right determination of this question must depend on the true construction of the statute. The object of the legislature, undoubtedly, was to provide ample security for the faithful performance of the duties of a sheriff, and to give to the party aggrieved by his neglect of duty, an adequate and efficient remedy. But it is said that the act prescribes the mode in which the remedy is to be pursued; and that a previous recovery in an action on the case against the sheriff, is requisite to entitle the party aggrieved to sue on the bond. The act certainly does not, in terms, specify in what manner this previous recovery is to be obtained. We are, therefore, in this case, as in all others, to adopt the established rules of construction, *in order to arrive at the intention of the law. The legislature must be presumed to have had in view the usual mode of proceeding against sheriffs, in such cases, at the time of passing the act. Now, we contend, that at the time this act was passed, there was no other mode of proceeding used against sheriffs for their default in not returning a writ than the one pursued in this case; and we are, therefore, justified in presuming, that this is the precise sort of recovery by the party aggrieved, contemplated by this statute. The case of *Burk v. Campbell*, (15 *Johns. Rep.* 456.) is the first instance to be met with in our courts, of an action on the case against a sheriff, for neglecting to return a writ; and, although the court very properly decided, that the plaintiff had also his remedy by action

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against the sheriff, yet the very question raised on the demurrer to the plea in that case, shows what was the general understanding on this subject; and that proceeding by rule and attachment was the only one practised. If, then, the proceeding by attachment was the only one in use before that time, against sheriffs, for their default, is it fairly to be presumed, that the legislature had in view another, and unusual mode, rather than the one uniformly adopted?

Again; it is objected, that there has been no recovery by the *party aggrieved*; that the proceeding and recovery on the recognizance is by the *people*, not the plaintiff in the execution. This objection will hardly be countenanced by the court. Though in the name of the *people*, the recovery is at the instance, and for the benefit only, of the plaintiff, or party aggrieved.

Again; it is said, that the recovery is not against the sheriff for any default or misconduct in his office, but for his neglect to appear according to the condition of his recognizance. But the court will take the whole replication together, and see the origin of the proceeding, and that the real foundation of the recovery is the default of the sheriff in not returning the execution. If there had been no such default, there would have been no attachment; and if no attachment, no recognizance upon which a recovery *could be had. The recovery on the recognizance, therefore, is for the default of the sheriff in not returning the *fi. fa.* That neglect of duty lies at the foundation of the judgment.

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Again; it is objected, that by this mode of proceeding, the sheriff may be compelled to pay the whole amount recovered on the recognizance, though it exceeds the sum in the execution, or the damages sustained by the plaintiff. But the act provides, that the court shall direct the amount for which execution is to be issued, so that no more than is justly due to the plaintiff, will be collected of the sureties of the sheriff. Besides, this court, without any statutory direction, has always a power over its own process to prevent any injustice or abuse.

There is a further view of the case, deserving of consideration, arising from the nature of the proceeding by attachment. It is the most expeditious and most beneficial mode of proceeding for the sheriff and his sureties. It is most favorable to the sheriff, if he is honest, as it gives him the opportunity of exculpating himself by his own oath; and he can never be made liable, unless he has made himself justly responsible. It is, in many cases, the only mode of getting at the truth; the only safe course for the party aggrieved, as the sheriff may be compelled to answer, on interrogatories, as to facts which could not otherwise be proved; as, for instance, whether an execution sent by mail was received by him, and at what time.

There may, perhaps, be some difficulty in fixing the precise

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extent to which the statute is to affect and control the proceeding on this bond. Independent of the act, it might be sufficient to show merely a breach of the condition of the bond, by the neglect of the sheriff to return a *fiery facias* which had been delivered to him. The condition of the bond has no reference or allusion to a previous recovery. The action, it is true, cannot be legally commenced without a previous recovery by the party aggrieved. But is not the commencement of the suit on the bond, *by the order of the court*, so far conclusive on this point, as to render it unnecessary to show a previous recovery?

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*Cady, in reply. Bail and sureties are favorites of the court, and, we may say, of the legislature. In regard to them, therefore, the statute is to be strictly construed. The intention of the act was merely to indemnify the party aggrieved. *Marvin*, the plaintiff in the execution, is the only person aggrieved by the alleged default of the sheriff. Has he recovered any judgment against the sheriff for that default? The *people* are not aggrieved or damnified by the sheriff's neglect to return the writ. The judgment which they have recovered is merely for the sheriff's breach of his engagement to them, to appear in this court to answer to any allegation of misconduct. The plaintiff, *M.*, ought to have brought his action on the case against the sheriff, for neglecting to return the writ, and had the amount of his damages ascertained. It does not follow, that the plaintiff is always damnified by not having the execution served and returned, to the amount of the debt due to him. It may be, that the defendant was utterly insolvent, and wholly destitute of property. The object of proceeding by rule and attachment, is to compel the sheriff to do his duty in regard to the process of the court. If the sheriff had regularly returned the *fiery facias*, it does not follow that the plaintiff would have recovered his debt, or any part of it.

SPENCER, Ch. J., delivered the opinion of the court. The question here depends entirely upon the construction to be given to the 6th section of the statute concerning sheriffs and their duty. (1 *R. L.* 418. 2 *Rev. Stat.* 476. § 1.) It enacts, "that in case of any recovery, by any party aggrieved against any sheriff, *for any default or misconduct* in his office, it shall be lawful for the Justices of the Supreme Court, upon motion in open court, to order the bond so given by such sheriff, to be put in suit against such sheriff or his sureties, or all or any of them." And the statute regulates the manner of levying, so as to satisfy the party aggrieved.

It has been argued by the defendants' counsel, that the judgment set forth in the replication was not recovered for any default or misconduct of the sheriff, in his office, during the time the defendants were responsible for his conduct ; *and

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that the judgment is not from any default or misconduct in office, but for his non-appearance on the recognizance, for which the defendants are not liable.

These objections are decisive. There has been no direct recovery against *Eisenlord*, the sheriff, for any default or misconduct in his office; and although the presumption is strongly against him, that he neglected his duty, and became answerable to *Marvin*, for not levying and returning the execution in his favor, yet his default, in that respect, has not been judicially ascertained. *Eisenlord's* default in not appearing on the recognizance, is only, argumentatively, evidence of a default or misconduct in his office. The plain and obvious meaning of the statute is, that the recovery against the sheriff, should be *ex directo*, for his default or misconduct, and where the judgment is grounded upon it. The attachment, and his non-appearance upon it, involve the forfeiture of his recognizance: but that does not positively show, as a recovery founded directly on the default would, that he had rendered himself liable to *Marvin* for the amount of his debt. The principle which has obtained with regard to sureties, that they are only liable when the case is brought within the very terms and scope of their undertaking, forbids an equitable or enlarged construction of the statute. We are bound, in this case, to give a construction upon that principle; and as the case is not brought within the words or plain meaning of the act, the defendants must have judgment.

Judgment for the defendants.

*GRIFFEN *against* HOUSE.

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IN ERROR, on *certiorari* to a justice's court. *House* brought an action of *assumpsit* against *Griffen*, in the court below, to recover back money demanded and received of him by *G.* a toll-gatherer at the easternmost turnpike gate, on the *Columbia* turnpike road, on the ground that the toll was illegally exacted, in consequence of the gate having been erected at the place where it stands, illegally, and without any authority for that purpose. By the third section of the "act to amend an act, entitled an act to establish a turnpike corporation for improving the road from the city of *Hudson* to the line of *Massachusetts*, on the route to *Hartford*," (sess. 23. ch. 69. 2 K. & R. 400.) the most eastwardly turnpike gate on that road is directed to be "at such place near the *Massachusetts* line aforesaid, as the president and directors, &c. should direct." It appeared at the trial before the justice, that the easternmost gate, at which *G.* had demanded and received the toll from *H.*, was situated just west of the place where the road from old *Tagh-*

The act incorporating the *Columbia* Turnpike road, leading from *Hudson* to the *Massachusetts* line, a distance of about twenty miles, authorizes the company to erect the most eastwardly turnpike gate on the road, "at a place near the *Massachusetts* line, as the president and directors should direct." Held, that a toll-gate erected at a place two miles and three quar-

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ters distant from the *Massachusetts* line, was not placed near that line, within the meaning of the act; and that, therefore, an action lies against the toll-gatherer at the

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suit of the person from whom he has demanded and received toll, at such gate, to recover back the money so unlawfully demanded and received.

It seems, that where a power is given to a company to erect toll-gates within certain limits, at their discretion, has been once exercised, it is at an end; and the company cannot, without some strong and manifest necessity, change the local situation of the gates which have been once erected, merely to suit their own convenience.

kanic flats to *Hudson* intersects the said turnpike road, which is about two miles and three quarters from the *Massachusetts* line; that after the turnpike was finished, the first gate erected near that line was at a place one mile and three quarters west of the *Massachusetts* line; that, afterwards, the gate was removed farther east, to a place about one mile distant from the line between this state and *Massachusetts*. After some years, the company removed the gate to the place where it now stands, and where it has ever since remained; being not more than six miles distant from the gate next west. It appeared that the whole length of the road is about nineteen miles and a half. The justice gave judgment for the plaintiff below.

**Per Curiam*. It was undoubtedly intended by the legislature to vest in the president and directors of the company some discretion in fixing the easterly gate; but it was to be near the *Massachusetts* line. This is a relative term, and regard must be had, in construing the act, to the length of the road, which is about twenty miles. In the case of the *People v. Denslow*, (1 *Caines*, 180.) this court decided, that a gate placed at the distance of eight chains and fifteen links from the house of *John Van Hoesen*, was a legal exercise of the power granted by this act requiring such gate to be near his house. But there must be some limit to the discretion given, and we are clearly of opinion, that considering the extent of the road, a gate two miles and three quarters from the *Massachusetts* line, is not placed near that line. We are, also, inclined to the opinion, that where the discretion has been once exercised, the power is exhausted; that it cannot be re-vested, so as to authorize the company to change and move the gate, to suit their convenience, without some strong and manifest necessity to warrant it. Here the company have acted capriciously, and have lost sight of the trust reposed in them, by changing, several times, the location of the easterly gate, contrary to their first opinion, and without any apparent necessity for it. The judgment must be affirmed.

Judgment affirmed.

JACKSON, *ex dem.* JONES and others, *against* LYONS.

Where a defendant in ejectment means to defend as a tenant

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ant in common with the lessors of the plaintiff, as the ground that there has

EJECTMENT for two messuages, &c. in the city of *Schenectady*, tried before Mr. Justice *Platt*, at the *Schenectady* circuit, in *August*, 1819.

*By the consent rule entered into by the defendant, it was stated to be "for a certain piece or strip of ground lying along *College-street*, being two feet in breadth along *Union-street*, and nineteen feet in the rear; and also for one undivided half

part or moiety of a certain house and lot of ground, situate in the second ward of," &c. At the trial, the lessors of the plaintiff admitted that they did not claim any part of the strip of land along *College-street*; and the witness stated that the defendant and his family occupied two rooms of the house in question on *College-street*, and that no other persons occupied any part of the premises. That *H. De Graff* died seised of the premises, (except the strip of land,) leaving four children, now living, two of whom married the lessors, *Jones & Haight*, and, with their husbands, are the lessors of the plaintiff. The defendant insisted, that as the plaintiff did not claim the strip of land, and had shown no title to one undivided moiety of the house and lot of ground, he could not, under the consent rule, recover against the defendant, and ought to be nonsuited.

The judge directed a verdict to be taken for the plaintiff, subject to the opinion of the court as to the true construction of the consent rule; and if the plaintiff was entitled to a verdict, then a judgment was to be entered for him, otherwise the verdict was to be set aside, and a judgment of nonsuit entered.

Huntington, for the plaintiff. He cited *Burr. Rep.* 1895. 4 *Johns. Rep.* 31. *Runington on Eject.* 199. 2 *Taunt.* 397.

Lush, contra.

SPENCER, Ch. J., delivered the opinion of the court. There is no question as to the strip of ground: it is admitted to belong to the defendant.

The defendant entered into the consent rule, and defended for an undivided moiety of the house, lot, &c.; the plaintiff proved a title to a moiety only; and it is now insisted that he is entitled to judgment on the verdict.

I am of opinion that the defendant is entitled to judgment. He has succeeded in negating the plaintiff's right to one undivided moiety of the premises; and as to the other moiety, the plaintiff was entitled to judgment by default, there being no defence as to that. The case of *Languedyeck v. Burhans*, (11 *Johns. Rep.* 462.) is directly to this point.

It is probable that the defendant meant to defend as a tenant in common, on the ground that there had been no ouster of the co-tenants. Had he applied, on an affidavit, stating that the lessors and the defendant were tenants in common, and that there had been no ouster, he would have been allowed to enter into the consent rule specially, stipulating to confess lease and entry, and also, ouster of the nominal plaintiff, in case an actual ouster of the plaintiff's lessors shall be proved at the trial, but not otherwise. (2 *Taunt. Rep.* 397.)

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been no ouster of the co-tenants, he should apply to the court, on affidavit, for leave to enter into the consent rule specially, stipulating to confess lease and entry only, not ouster, unless an actual ouster of the plaintiff's lessors should be proved at the trial.

Where ejectment was brought by one tenant in common, against his co-tenant, for an undivided moiety, and the consent rule for an undivided moiety was entered into, in the common form, and the plaintiff proved title to one undivided moiety only: *Held*, that the defendant was entitled to judgment, as to the one moiety, though as to the other, the plaintiff was entitled to judgment by default.

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Judgment for the defendant.

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MURRAY.

The act in addition to the act relative to executions, passed April 18, 1815, (sess. 38, c. 227. 2 Rev. Stat. 367.) exempting from execution and distress for rent, one cow, &c. owned by any person, being "a householder," was intended for the benefit of poor

[* 401] families; and the father and husband, or head of the family, who has left the state, leaving his wife and children living together, is "a householder," within the meaning of the act.

The family of *M.* were in the act of removing to the house of another, a few miles distant, and while on the road, in a wagon, their household furniture, and an only cow, were seized on an execution, and the cow taken and sold; *Held*, that the wife and children, being together, were still the family of *M.* and the cow was exempted from execution. The consent of the wife, that a cow, or a bed, might be taken and sold on execution, on the officer's releasing other articles not exempted by law, is not valid or

WOODWARD against MURRAY.

IN ERROR to the Court of Common Pleas of *Orange* county. *Murray* brought an action of *trover* against *Woodward* for a cow. The defendant pleaded the general issue. It appeared on the trial, that *M.* had gone to the state of *Ohio*; and had left his family, consisting of his wife and children, residing in the house which he had occupied. It was reported that he had absconded to avoid his creditors. His family, soon afterwards, in *March*, 1817, were about removing to the house of his wife's father, a few miles distant; and while they were on the road in a wagon, with their household furniture, and driving a cow, the only one which they possessed, *Isaac Young*, a constable, levied on the cow and the other goods, by virtue of an execution issued against **M.* in favor of *W.*, drove her off and sold her, and she was purchased by *W.* who, afterwards, sold her for 30 dollars. The defendant offered to prove that *M.* before the property was taken in execution, had absconded from the state, to avoid paying his debts; but the evidence was objected to, and overruled by the court. The defendant moved for a nonsuit, on the ground that the plaintiff was not a householder, nor a resident of the state, as the family had abandoned their habitation, because they were no longer able to keep house; and that the plaintiff was not entitled to the exemption provided in "the act, in addition to an act, entitled, an act concerning judgments and executions," passed April 18, 1815, (a) by which one cow, among other things belonging to a householder, was exempted from execution; but the court overruled the motion. And the counsel for the defendant excepted to the opinion of the court. The defendant then proved, by the constable, that the execution was duly issued, and that when the cow and other things were seized, the wife of *M.* said she would give up the cow, if the witness would release the other property, which he agreed to do; and accordingly, with the consent of the wife and her father, the cow was given up to the constable, who released the other property. *W.* was present all the time. A witness for the defendant testified, that he was present and heard no agreement as mentioned by the other witnesses. The court charged the jury, that *M.* was a householder within the meaning of the act, and that the cow was exempted from execution; that if the wife did consent to the cow being taken, she had no legal

(a) The act declares "that all sheep, to the number of ten, together with the fleeces and the cloth manufactured from the same, one cow, two swine, and the pork of the same, all necessary wearing apparel and bedding, necessary cooking utensils, one table, six chairs, six knives and forks, six plates, six tea-cups and saucers, owned by any person being a householder, shall be exempted from execution, and distress for rent, any law to the contrary notwithstanding." (Sess. 38. ch. 227.) (2 Rev. Stat. 367.)

authority to do so ; and the jury found a verdict for the plaintiff, for 35 dollars and 12 cents, on which the court gave judgment. A bill of exceptions was tendered by the defendant, on which a writ of error was brought to this court.

**Betts*, for the plaintiff in error, contended, that the *cow* of *M.* was not exempted from execution. He had absconded from the state, and gone to reside in *Ohio*. He was not a "householder," within the meaning of the act, which was intended for the benefit of persons actually resident here, keeping house together with, and supporting their families. This act being in restriction of the common law rights of creditors, ought to be construed strictly. (1 *Lord Raym.* 340.)

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binding, without
special author-
ity from her
husband.

Wisner, contra, insisted, that the family of the plaintiff living together, constituted his household, though he was absent. He was, therefore, in the popular and legal sense, a householder. Though his family were removing a few miles from their former habitation, they were kept together, and were still a household. The statute ought to be construed liberally.

PLATT, J., delivered the opinion of the court. There was an attempt by the defendant, at the trial, to show that the wife of *M.* consented to the taking of the cow, provided the officer would not seize the beds and other furniture ; but I think that fact was not established ; and, besides, I do not think the wife had a right to waive the husband's privilege, by turning out an only cow, in order to preserve other property which was not exempted from execution. Without special authority from her husband, a wife has no right to direct the officer to sell a cow, or a bed, articles exempted by law, in order to preserve such as are not exempted.

The evidence rather shows, that the consent of the wife (if she gave any) was extorted by the officer, who told her, that her husband was not then a householder ; and that he had a right to levy on any part of the property.

The real question is, whether *Murray* was a "householder," so as to entitle him to the exemption under the act of the 18th of *April*, 1815, (sess. 38. ch. 227. 2 *Rev. Stat.* 367. s. 4. and s. 5.) which exempts from execution, one cow, &c. owned by any person "being a householder."

According to the lexicographers, household means "a family living together," and a "house holder," "a master of a family." Sacred scripture, in the same sense, declares, "he that provideth not for his own household, is worse than an infidel." I think it clear, that the legislature meant to confer this privilege on each of those little primary communities called *families*. *Murray* had gone to *Ohio*, leaving his wife and children living together as a family. They were his *household*, and he was the "householder." To say, that a family, while in the act of removal, and on the highway, may be deprived of their bed,

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and their cow, on execution, because they did not, for the time, inhabit a dwelling-house, would be a perversion of the statute. So long as they remain together as a family, without being broken up, and incorporated into other families, the privilege remains. It was designed as a protection for poor and destitute families; and the forlorn and houseless condition of this family, in the absence of the husband and father, gave them a peculiar claim to the benefit of the statute.

I am, therefore, of opinion, that in sustaining the action, the court below decided correctly; and that the judgment ought to be affirmed.

Judgment affirmed.

FLEMING against SLOCUM.

A court of law has concurrent jurisdiction with [* 404]

the Court of Chancery, in cases of fraud.

Where a vendor is guilty of a fraudulent concealment of material facts, in relation to the sale, to the injury of the vendee, an action at law is maintainable, to recover damages.

But the fraud must be proved; it cannot be presumed. Therefore, where, in the sale of a slave, without warranty as to his good qualities, there was no other proof of a fraudulent representation, or of a fraudulent concealment, but what might be inferred from the fact, that the vendee paid a sound price for a good and honest slave, but who proved to be bad, and dishonest, and the vendor knew, at the

THIS was an action on the case, to recover damages for a fraud in the sale of a negro man, named *Tom*, by the defendant *to the plaintiff, tried at the *Columbia* circuit before Mr. Justice *Van Ness*, in *December*, 1819.

The declaration contained three counts, 1. For falsely warranting the slave, as good, steady and honest: 2. For fraudulently concealing the fact that the slave was dishonest, and addicted to stealing: 3. For fraudulently representing him as honest, knowing him to be a thief, and fraudulently concealing that fact.

At the trial, the plaintiff gave in evidence a bill of sale from the defendant, dated the 25th of *September*, 1815, of the boy or man *Tom*, aged about twenty-one years, for the consideration of 270 dollars. The bill of sale contained a covenant by the defendant, that the negro man *Tom* was his slave for life, and that he would convey and warrant him to the plaintiff as such. The plaintiff was not present when the bill of sale was executed.

The plaintiff then proved by several witnesses, that *Tom* had been frequently detected in stealing, and had been imprisoned for stealing, and was a bad fellow; and that he had stolen from the defendant before he sold him to the plaintiff, and that the defendant knew it.

There was no proof of any warranty or representation made by the defendant to the plaintiff, as to the character of the slave. The defendant moved for a nonsuit, and the judge directed the plaintiff to be called and nonsuited, with liberty to move to set the nonsuit aside, and for a new trial.

A motion was made to set aside the nonsuit, and for a new trial, on a case agreed upon by the parties.

E. Williams, for the plaintiff.

Van Buren, for the defendant.

SPENCER, Ch. J., delivered the opinion of the court. The nonsuit was on the ground, that there was no proof of any fraudulent representation of the qualities of the slave; and, probably, also, because there was no proof of a fraudulent suppression of the truth. As courts of law have concurrent jurisdiction with courts of equity in cases of fraud, it *cannot, I think, be doubted, that where it is made to appear, that a vendor has been guilty of a fraudulent concealment of material facts, to the injury of the vendee, an action at law can be sustained to recover damages. It is, also, a rule of equity, as well as of law, that a *suppressio veri* is equivalent to a *suggestio falsi*; and where either the suppression of the truth, or the suggestion of what is false, can be proved, in a fact material to the contract, the party injured may have relief against the contract. It is, however, another well-settled rule, that fraud is not to be presumed, but must always be proved. In the present case, the only fact from which a suppression of the truth can be inferred, is the consideration paid by the plaintiff; and had it been proved, that the sum paid was a sound price of a slave, free from all the bad qualities *Tom* possessed, that alone would not have been sufficient. It is the plaintiff's misfortune that he did not, either expressly guard against the imposition practised upon him, or that he has no evidence of any representation made to him by the defendant. The motion to set aside the nonsuit must, therefore, be denied.

Motion denied.

BOUGHTON against CARTER.

IN ERROR, on *certiorari*, to a justice's court.

Carter sued *Boughton* before the justice, for obstructing the turnpike road and ditch, opposite to the land and garden of the plaintiff, so as to cause freshets, and the water to run upon and wash his land and garden. The defendant, at the trial, admitted that he made the obstructions complained *of, and contended that he had legal right to do so, in order to make the necessary repairs to the road, and to prevent its being injured by the rain or freshets. The cause was tried by a jury. The plaintiff proved that the defendant had made a bar across the turnpike road, above the plaintiff's garden, and thereby obstructed one of the ditches, in such a manner, that it caused the water to flow in upon his garden, and washed away the soil, and injured the vegetables, &c. There was a contrariety of evidence as to the fact of the plaintiff having consented to

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time, that he was so, this alone is not
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sufficient to support an action against the vendor, to recover damage for a fraudulent concealment.

Though a turnpike company have a lawful right to repair their road, so as to prevent the effects of rain or freshets, yet
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in the exercise of this right, they must take care not to injure the owners of the adjoining land. They have no right to turn the water which washes the road on to the land of a private person;

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and if a damage arises to the owner of the adjoining land, in consequence of their want of care, and negligence in this respect, he may have an action on the case, to recover the damages he has sustained.

have the bar so made across the road, and of a similar one having been made near the same place, in 1818, and as to the necessity and manner of its construction, as well as to the plaintiff's having forbidden the making of it. The jury found a verdict for the plaintiff, for eight dollars damages, on which the justice gave judgment.

Per Curiam. We ought not to disturb this verdict. It appears that the question before the jury was, whether the bar across the road had been properly constructed, and whether the damage done to the plaintiff's garden might not, with reasonable care and diligence, have been avoided. A turnpike company have a legal right to repair their road, in such a manner as to prevent the effect of rains or freshets; but in the exercise of this right, they are bound so to make the repairs, as not to injure the owner of the adjoining land. They have no authority to turn the water which washes the road upon the land belonging to private persons. They can guard against this injurious consequence, and it is their duty to do so. If they will not, however, take this reasonable care, and the property of individuals is damaged by their unskilfulness or negligence, they are responsible. The jury were the proper judges of the facts contested at the trial, and had all the means of coming to a right decision upon them, as the court below was held in the immediate vicinity of the place where the injury complained of was done. We are of opinion, therefore, that the judgment given on the verdict ought to be affirmed.

Judgment affirmed.

[* 407] *ROUSE and EDDY, *Overseers of the Poor of PITTS-TOWN, against MOORE and HUNTER, Overseers of the Poor of PLATTSBURGH.*

The overseers of the poor, being the public agents and trustees of the towns, in respect to the poor, have, without any express authority from the legislature, a capacity to sue co-extensive with their public trusts and duties. They are

THIS was an action on the case, to recover compensation for supporting *Elijah Briggs*, a pauper, removed to *Pittstown*, by the overseers of *Plattsburgh*, by virtue of an order, which was, afterwards, quashed at the Court of Sessions of *Clinton* county. The action was for the expenses of supporting the pauper after the order of removal was granted.

This cause came before the court in *October* term, 1818, on a demurrer to the second plea, on which the court gave judgment for the plaintiff. (*S. C. 15 Johns. Rep. 436.*) Most of the facts in the case appear in the pleadings there stated. The plaintiffs afterwards proceeded to trial on the plea of the general issue, and to have their damages assessed on the issue

at law, at the *Rensselaer* circuit, in *July*, 1819, before Mr. Chief Justice *Spencer*.

It was admitted, at the trial, that it appeared by the record of the proceedings of the Court of General Sessions of the peace of the county of *Clinton*, that on the 8th of *August*, 1815, two justices of the peace, residing in *Plattsburgh*, made an order for the removal of *Elijah Briggs*, the pauper, to *Pittstown*, where he was received on the 26th of *October* following. No appeal was entered until *May*, 1816, when the respondents objected to its being received, as it had not been entered at the Court of Sessions next after the removal; but the Court of Sessions overruled the objection, *and proceeded to hear the parties on the appeal. The appellants proved that the pauper was a bastard, born in *Pittstown*, of *S. G.*, whose father resided a few years before in *Hoosick*, and with whom she lived. The Court of Sessions adjudged that the last place of legal settlement of the pauper was in *Hoosick*, and not in *Pittstown*, and therefore the order of removal was ordered to be quashed, and that the respondents pay to the appellants their costs, which were accordingly paid. The defendants, *M.* and *H.* were overseers of the poor of *Plattsburgh* at the time the order was quashed, and until the commencement of the present suit, but are not, at present, overseers; and the notice of appeal was served on *Moore* and *Buck*, who were then the overseers in office. It was proved that the plaintiffs were the overseers of the poor of *Pittstown*, when the pauper was removed, and when this action was commenced, and during the intermediate time. The pauper became sick in *July*, 1816, and died at *Pittstown*, on the 19th of *March*, 1819. Before the commencement of this suit, a notice had been served on the overseers of the poor of the town of *Hoosick*, pursuant to the 16th section of the statute, (1 *N. R. L.* 279. sess. 36. ch. 78.) requiring them to provide relief for the pauper. The plaintiffs proved the sums paid for the board and medical attendance of the pauper, pursuant to the order of the justices for that purpose, he being so sick and diseased as to be unable to be removed. The plaintiffs claimed interest on the amount; but the judge ruled that it was not to be allowed. The plaintiffs claimed the expenses down to the time of the pauper's death; but the judge ruled that they were entitled only to the amount expended, to the 6th of *January*, 1817, when the present suit was commenced. The defendants moved for a nonsuit: 1. Because the appeal to the Sessions was not entered at the court next after the order of removal. 2. Because there was a variance between the amount of costs and expenses alleged in the declaration to have been ordered to be paid by the Court of Sessions, and the amount mentioned in the copy of the record produced. 3. Because the record showed that the pauper had a settlement at *Hoosick*. 4. Because the plaintiffs had not proved that the defendants had funds; *nor that they had

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corporations
sub modo.

Where a public
office is in-
stituted by the

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legislature, an
implied author-
ity is conferred
on the officer to
bring all suits,
as incident to
his office, which
the proper and
faithful dis-
charge of his
official duties
requires.

Where the
order for the
removal of a
pauper from
one town to an-
other, is on ap-
peal to the
Court of Gener-
al Sessions of
the Peace, re-
versed and
quashed, the jus-
tices of the
peace of the
town to which
the pauper was
so improperly
removed, may
make an order
for his removal
back to the town
from whence he
was removed;
or if it appears
that the pauper
has no settle-
ment in that
town, they may
make a new
original order
for his removal
to the place
of his last legal
settlement.

The over-
seers of the
town to which a
pauper is so
improperly re-
moved, cannot,
after the order
is quashed,
maintain an ac-

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tion on the case against the overseers of the town from which he was removed, to recover the expenses of his maintenance, he having fallen sick, after his removal; the presumption being, that the order of removal was obtained *bona fide*: the statute does not make it the duty of the overseers of the poor who cause the pauper to be removed to another town, to take him back at their own charge.

Whether, if the pauper so improperly removed, has no legal settlement within this state, such an action can be maintained?

received any order of a justice to take back the pauper, or that he was sick and unable to be removed. The objections were overruled by the judge, who reserved the points. The defendants proved that the pauper was a bastard, born in *Pittstown*, about thirty-four years ago, of *S. G.*, whose father was settled in *Hoosick*, and with whom she resided before and after the child was born.

A verdict was taken for the plaintiffs, by consent, for 293 dollars and 54 cents, subject to the opinion of the court, on a case to be made containing the facts above stated, with liberty to either party to turn the case into a special verdict, or bill of exceptions. It was further agreed, that the defendants, if the court should decide that they had a right to do so, might, also, move in arrest of judgment, when the case was brought on to be argued.

The case was argued by *L. Mitchell* and *Van Vechten*, for the plaintiffs, and by *Walworth* and *Huntington*, for the defendants.

For the plaintiffs, it was contended, 1. That the decision of the court, on the demurrer, (15 *Johns. Rep.* 442.) established the sufficiency of the facts stated in the declaration, and settled many of the points attempted to be raised at the trial. The parties on the record being the same, the defendants are estopped by that decision, from controverting the facts or title established by it. (*Outram v. Morewood*, 3 *East*, 346.) It was proved, that the order of removal was quashed. The amount of costs was not set forth in the declaration, *in hac verba*; the substance, only, therefore, need to be proved, and any slight variation was immaterial. (8 *Johns. Rep.* 455.) The amount of costs awarded was, indeed, surplusage; and *utile per inutile non vitiatur*. (5 *Johns. Rep.* 89.) The admission by the counsel, of what the record contained, entirely repels the objection. The evidence as to the damage for which the plaintiffs had become *liable*, was proper, and the orders of the justices, as to the medical aid, were sufficient, it being a matter within their discretion. (8 *Johns. Rep.* 323.) The defendants, *M.* and *H.*, were both proved to be overseers when the order was quashed, and a certified copy of the order of reversal was served on their counsel. Notice that the pauper was likely to become chargeable to *Pittstown*, was unnecessary, as *Moore* had made complaint of that fact, and must have known it.

Again; the *appeal* was to the next Court of Sessions, within the meaning of the act. The fact, that the legislature had, in *January*, established an extra court of sessions, for *February*, was unknown to the plaintiffs. Besides, no objection was made, on this ground, at the Sessions and the proceedings before them must be presumed to be regular, until set aside

(*Str.* 1168. 2 *Burr.* 100. *Doug.* 102. 192. 7 *Term Rep.* 200.) The defendants having, also, appeared at the Sessions, and tried the appeal on its merits, have acquiesced in the regularity of the proceedings.

2. It was not necessary to allege or prove, that the defendants had *funds* in their hands, for the maintenance of the pauper. If another town sends a pauper to the defendants, they, as overseers, are bound to receive him, whether they have funds or not. If, therefore, the pauper had been sent back on an order of the justices of *Pittstown*, the defendants would have been obliged to receive him. So, if another town gives notice to them to provide for a sick pauper, belonging to their town, and who cannot be removed, and they neglect to make the necessary provision, they are liable to have their goods distrained, whether they have funds or not. The policy of the statute, and the pressing wants of the poor and distressed, forbid that the overseers should be allowed such a plea for their neglect of a sacred duty. There is a moral obligation on the overseers of the poor, settled in the town, to provide for their support, without any reference to the question of funds. (2 *East*, 505. 3 *Exp. N. P. Rep.* 91. 3 *Los. & Pull.* 247. 13 *Johns. Rep.* 332. 15 *Johns. Rep.* 442.) The case of *Bartlett v. Crozier*, (17 *Johns. Rep.* 439. in error) does not apply. There was no misfeasance, or omission of duty in that case. It was the case of overseers of highways, who are to lay out the moneys they receive, on repairing the roads, &c.; the statute makes their duty to depend on 'their having funds in their hands.

3. It is no answer to say, that the defendants had no order *to carry the pauper back to *Hoosick*, the place of his last legal settlement. Two justices might, by an order, have sent him back, for it is merely an execution of the order of sessions, and until he was sent back, the duty on *Plattsburgh* to support him, continued. (*Const. Poor Laws*, 700. *Houlton v. South Beverton*. *Comberb.* 401. 2 *Salk.* 475. 488.) *Pittstown* could not send him back until he became chargeable; and when he became sick, he could not be removed. This court, in 15 *Johns. Rep.* 446. say, it may well be doubted whether *Pittstown* could make an original order of removal as to this pauper. Besides, *Plattsburgh* might have got an order to send him back, as well as *Pittstown*. If an injury has arisen from the neglect, it was the fault of the defendants, and they are responsible.

4. There can be no question, that the defendants were suable, in their official capacity, as overseers of the poor. The court, in 15 *Johns. Rep.* 436., had no doubt on this point. They merely declined deciding whether the defendants were liable, in their *private* capacities, for their own official acts, or those of their predecessors in office. The books are full of suits against overseers of the poor in their official capacity. (3

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Went. Plead. 23. Sit. Special Assumpsit, 31. 2 East, 505.) The plaintiffs proceed, on the principles of the common law, for a neglect of duty in the overseers of *Plattsburgh*, by which an injury has been produced to *Pittstown*. It is not necessary to question the succession in office. It is no matter if the defendants are made liable in their individual capacity. If they pay the plaintiffs, it will be so much paid for the town of *Plattsburgh*, and for which they may claim a remuneration from their successors in office. The action cannot be defeated, on this ground, without saying, that the overseers of the poor cannot be sued in any case. If all the requisite grounds for an action exist, it is no objection, that the suit is against overseers. Though not strictly a corporation, having a corporate name and seal; yet, they are *quasi* corporations, having a succession, and a capacity to sue and be sued, as to all matters appertaining to their official duties. (1 *Kyd on Corp.* 19.) They are the representatives of the town as to every thing concerning the poor; and it is their business to assert and defend the rights of the town, in regard to the settlement of the poor. It would be nugatory for the statute to confer powers and impose duties on the overseers of the poor, if there were no means of carrying those powers into execution, or of enforcing the performance of those duties. From necessity, therefore, they must be regarded as corporations, *sub modo*; otherwise, the salutary provisions of the statute could never be fulfilled. (a) The case of *Crouse v. Mabbet*, (11 *Johns. Rep.* 167.) does not apply here.

5. A motion in arrest of judgment, cannot prevail as to any ground which might have been taken advantage of, on the demurrer. (1 *Str.* 425. 2 *Tidd's Pr.* 825.) The matter of law having been solemnly decided by the court, they will not permit any one, afterwards, to come, as *amicus curiæ*, to inform them, that the judgment which they gave, on mature deliberation, is wrong.

For the defendants, it was argued, 1. That, at common law, there was no obligation on a town to support the poor, nor any remedy to enforce the obligation, if any existed. As between town and town, every obligation is created, and every necessary remedy is provided by statute. Why, then, should the remedy provided by statute be abandoned, and the common law be resorted to, when such an action was never known before? This is an attempt to support an action on general principles, not on the authority of any adjudged case. Overseers of the poor are not a corporation; and they can only sue in the particular cases pointed out in the statute which creates their offices. The injury complained of, is not to the plaintiffs, but to the town of *Pittstown*. If any one has a right of

(a) Vide *Overseers of Norwich v. Overseers of New Berlin*, ante, p. 384. *H. Bleeker, arguendo.*

action, it is the town, not the overseers, whose rights and duties are all created by the statute. In *Crouse v. Mabbet & Tripp*, (11 *Johns. Rep.* 167.) the plaintiffs brought an action against *Crouse*, for bringing a pauper into the town of *W.*, without lawful authority, *he having no settlement there. The pauper fell sick, and had been supported by the plaintiffs, as overseers of *W.*, until he died; but the court held, that the action could not be sustained. In *Rex v. Byce*, (1 *Const. Poor Laws*, 324.) an indictment was held to lie against a person who had appealed, for refusing to pay to the overseers the costs; and the reason given is, that there was no remedy provided, nor any direction given, by the statutes, as to the means of enforcing payment.

Parish officers, in *England*, may be a corporation, *sub modo*, as it relates to the ordinary business of the parish. But their office, as *overseers of the poor*, is created by statute, and their duties are all prescribed by the various statutes relative to the poor. As late as 1814, (54 *Geo. III.* ch. 170. sec. 8.) it was found necessary, in *England*, to authorize by statute, the overseers of the poor, and their successors, to prosecute on bonds, &c. given to indemnify the parish against bastards, and to legalize such bonds and securities as had been before taken. The 27th section of our act for the relief and settlement of the poor, (1 *N. R. L.* 289. sess. 36. ch. 78.) which was not contained in the former statute, expressly authorizes suits to be brought by the overseers, for the time being, on notes given for the poor moneys loaned out, on interest, and the power and obligation is continued to their successors. These different provisions by statute, enacted after the poor laws have been in operation two hundred years, afford a strong legislative opinion, that an action of this kind cannot be maintained, without some express provision by statute. There is no moral obligation in favor of the plaintiffs, for the county is made liable to them, by statute, for the expense of supporting sick paupers who are unable to be removed. (1 *N. R. L.* 283.) If the overseers can sue, in their official capacity, then the action survives, in case of the death of the individual, and may be continued by their successors; but express provision is made for this purpose, by the *thirty-first* section of the act. (1 *N. R. L.* 291.)

2. The defendants are not to be made liable, for they did not remove the pauper to *Pittstown*. The order for removal *was the judicial act of the magistrates, and the actual removal was the individual act of the constable to whom the order was delivered, and over which the defendants had no control. The defendants finding a stranger in the town, make their complaint, as overseers, to the justices, which is all that is required of them by the statute. In *England*, the overseers and parish officers make the removal. (2 *Salk.* 493.) Here it is done by the constable, on the order of two justices. The

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defendants, after making their complaint to the justices, were passive. They could do nothing more. Their precise duty is pointed out by the statute; and if an overseer is to be made responsible for the acts of justices, on his complaint, no man could be found who would accept the office. Wherever the statutes relative to the poor have given damages or costs, the town is considered the real party, and is acted upon through their overseers in office at the time. The remedy is by distress, and provision is made to pay them the balance, if any, on going out of office. Now, both these defendants were out of office, at the time of trial, and there is no provision made to reimburse them. Justices of the peace only, can make orders relative to the poor. In *Rex v. Overseers of Chichester*, (1 *Const. Poor Laws*, 403.) an order directing the present overseers to pay to their predecessors, money expended for law charges, was held not to be good. Again; the order of removal made by the justices, was regular and legal; and having been reversed on appeal, it can have no greater effect than a judgment reversed on a writ of error, which does not make persons acting under the original judgment, liable to an action for a tort. If, therefore, the defendants did cause the removal of the pauper to *Pittstown*, it was a judicial act, and they cannot be made liable, unless they acted maliciously, corruptly, or *mala fide*. (2 *Caines's Rep.* 212. 2 *Mass. Rep.* 243, 244. 1 *East*, 555. 563. *Bull. N. P.* 64. 11 *Johns. Rep.* 114.) Nothing of that kind is pretended.

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3. No action will lie against the defendants for not removing the pauper back. The defendants had no authority for that purpose. (2 *Const. Poor Laws*, 631. *Clifton v. Ramstock*.) If the justices of *Pittstown* could have sent the *pauper back to *Plattsburgh*, then that course ought to have been pursued. If not, they might clearly have removed him to *Hoosick*, where they knew he had a legal settlement. If, as was alleged in the declaration, but which was not proved at the trial, the pauper was too sick to be removed, then the 16th section of the statute provides a sufficient remedy, which should have been pursued. A similar remedy is provided in *England*, in such cases, by what is called the suspension act. (35 *Geo. III.* ch. 101. sec. 2.) There is no statute provision for the expenses of sending the pauper back. Where a constable removes a pauper, under an order of two justices, the counties through which the pauper passes, pay the expense. The town only is authorized to raise money, under our statute, and there is no way provided to compel them to do it. The overseers cannot afford relief, without a justice's order; and if they do, they lose the amount paid by them.

Again; there is no evidence that the defendants had any funds which would have enabled them to provide for the pauper. In *England*, the overseers and churchwardens may levy and collect poor rates, without the consent of the parish-

ioners. (*Salk*. 531. 8 *Mod*. 97. *Lord Raym*. 1013.) Though two justices there were to allow the rate, yet it is mere matter of form, and the parish officers may compel them to do it, by *mandamus*. (1 *Str*. 393. 1 *Sid*. 377.)

In *Bartlett v. Crozier*, (15 *Johns. Rep*. 254.) *Spencer*, Ch. J., says it would not have been a wilful neglect of duty, nor any neglect at all, if the officer had not the means of repairing the bridge: and *Kent*, Chancellor, in his opinion, in the same case, (17 *Johns. Rep*. 439.) observes, "If the overseer had no money, he was not guilty of a breach of duty, though he did wilfully suffer the bridge to remain out of repair." Under the *English* statutes, overseers have a right to relieve the poor, without an order of the justices, who only make orders to compel the overseers to relieve, when they improperly refuse to do so; and, in such cases, the overseers are summoned to show cause, &c. (43 *Eliz*. ch. 2. 9 *Geo*. I. c. 2. 17 *Geo*. II. c. 38. 36 *Geo*. III. ch. 23.) Our statute gives a remedy by *distress*, on the property of the overseers in office; and for that they are allowed in their *accounts. It is singular that no action of this kind has ever been brought in *England*. There the churchwardens are common law officers. The overseers of the poor here are created by statute. In *Bartlett v. Crozier*, the chancellor justly observes: "Where the law renders a public officer liable to special damages, for neglect of duty, the cases are those in which the services of the officer are not gratuitous, or coerced, but voluntary, and attended with compensation; and where the duty to be performed is entire, absolute, and perfect." In the case of the overseers of the poor, their services are coerced, and they are allowed no compensation: and their duties are not entire, for they can only act under the order of a justice, who might not authorize the expenditure; and they are not absolute, for it must depend on the fact of their having funds sufficient to enable them to relieve the pauper; nor are they perfect, for no authority is given them by law to relieve a pauper so situated.

The only remedy ever attempted to be pursued in *England* against overseers, for refusing to maintain paupers, to levy poor rates, &c. is by indictment. (1 *Str*. 101. *Salk*. 609. 5 *Mod*. 199. *Viner Ab. tit. Poor*, 415. 8 *Mod*. 321. 7 *Mod*. 410. 2 *Str*. 1146. 2 *Burrow*, 799. *Sayer*, 163. 1 *Const. Poor Laws*, 324. 338. 443.)

4. The plaintiffs were bound to show that the defendants had notice of the order of reversal, and that the pauper was sick in *Pittstown*, and likely to become chargeable to that town, and also, a request to remove or support him.

The order was reversed the 16th of *May*, and the pauper did not become chargeable to *Pittstown*, until the 30th of *July*. Where the pauper was, in the intermediate time, does not appear, except from the recital in the order of maintenance of that date, which states that he had come to reside at *Pitts-*

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town, and was taken sick, &c. For aught that appears, he might, at the time of the order of reversal, have been in the adjoining town of *Hoosick*, which was the place of his legal settlement. The declaration states, that the defendants had notice that the pauper remained in *Pittstown*, was sick and chargeable, and that the defendants had been requested to remove or support him. These were all material allegations, and ought to have been fully proved, or the plaintiffs should have been nonsuited.

5. The plaintiffs failed in showing that the pauper had no settlement within this state. It is now admitted that his legal settlement was in *Hoosick*, and this fact was known to the plaintiffs. It is contended that the agreement in the declaration is immaterial. But the court, in their decision on the demurrer, considered it as material, and it was the principal ground on which the action was held to be sustainable; for if he had no settlement in the state, the town in which he was taken sick was bound to maintain him. (*Comberb.* 287. 3 *Johns. Rep.* 17. 17 *Johns. Rep.* 41. 1 *N. R. L.* sess. 11. ch. 62. ch. 6. s. 7.)

6. The plaintiffs knew that the pauper's settlement was in *H.*, and proceeded against that town on the 16th section of the statute. They are, therefore, estopped from resorting back to *Plattsburgh*. (*Fort Ann v. Kingsbury*, 14 *Johns. Rep.* 367.) As the plaintiff gave notice agreeable to the 16th section of the act, it is to be presumed that the preliminary steps, which the court said were requisite under that section, have been taken: and the overseers of *H.* not having appealed, it is conclusive against them.

7. The plaintiffs did not prove that the defendants had been guilty of any offence within the county of *Rensselaer*, and therefore the defendants are entitled to judgment. (1 *N. R. L.* 155.)

[SPENCER, Ch. J. This objection should have been made at the trial.]

The case is made, by consent, subject to all the facts in the case.

The unanswerable objection in this case is, that the order of removal to *Pittstown*, on appeal, was quashed. Then, as between the two towns, the pauper's settlement was at *Plattsburgh*, and the justices of *Pittstown* had a right to make an order for his removal back; (3 *Burns's Just.* 572. 2 *Salk.* 488. 2 *Nolan*, 219. 7 *Mod.* 10. *Burr. Sett. Cases*, 140.) or they might have made a new original order of removal, and sent him to *Hoosick*, his place of legal settlement.

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*SPENCER, Ch. J., delivered the opinion of the court. It has been objected that the plaintiffs, as overseers of the poor of *Pittstown*, have not a capacity to sue for the injury alleged in the declaration. This point was reserved when a question on

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the pleadings came before the court (15 *Johns. Rep.* 436.) in this cause. However correct the principle may be, ordinarily, that the court will not, upon a motion in arrest of judgment, suffer a point decided on demurrer, to be again agitated, that principle has no application here; for the demurrer was not to the declaration, but to the second plea. Independently of that, we expressly waived the decision of this question, because it had not been argued. Under the facts in the case, it is not impeaching our decision on the demurrer, to hear this point argued again, and it would be very unjust not to entertain the question now.

The overseers of the poor are town officers, coeval almost with the settlement of the country. They are the public agents and trustees of the towns, in respect to their poor, and must necessarily, without express authority from the legislature, possess a capacity to sue, commensurate with their public trusts and duties. In *Jackson v. Hartwell*, (8 *Johns. Rep.* 424.) we recognized the authority of the *supervisors of a county*, before the act authorizing them to take grants of land for county purposes, to take such grants. They are, *pro tanto*, endued with a corporate capacity. We there said, that there are many instances in the case of collective bodies of men, coming under one general description, endowed with a corporate capacity, in some particulars expressed, but who have, in no other respect, the capacities incident to a corporation. We mentioned the example of a power in churchwardens to take goods, and to bring actions of trespass, and referred to *Mr. Kyd*, for numerous instances of the like kind. In short, there can be no doubt that when a public office is instituted by the legislature, an implied authority is conferred on the officer, to bring all suits, as incident to his office, which the proper and faithful discharge of the duties of his office require. The statute for the relief and settlement of the poor, (1 *N. R. L.* 279.) has given the right to sue in certain cases, in express terms; but this by *no means proves, that the power would not have existed independently of the statute.

It now appears, that the pauper had a settlement in this state, and that it was in *Hoosick*; and the main question is, whether the overseers of the poor of *Pittstown* were bound to make an order removing the pauper to that town. When the case came before us, on the former occasion, we expressed an opinion that they were not bound to do so. It is to be observed, that this was an *obiter dictum*; for the declaration, the sufficiency of which we were considering, contained an express averment that the pauper had no legal settlement in this state. If that averment had been proved, and if it had not appeared that the pauper had a legal settlement in the state, I certainly should have considered this action as sustainable, for the reasons there expressed by the court. On a review of the cases, I am of opinion, that it was competent to

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Pittstown to make an order of removal; and that the pauper having a legal settlement in this state, the defendants, as overseers of the poor of *Plattsburgh*, are not answerable.

We cannot intend that the order, made at the instance of the overseers of *Plattsburgh*, was done *mala fide*. This is never to be presumed, even of individuals; and the consequences to which they exposed those whom they represented, as regards the appeal, the expenses of the pauper, and the costs, all concur in repelling the idea, that their motives were not *bona fide*. The act, to be sure, turns out to be unwarranted; and the town of *Plattsburgh* has paid the legal penalty of that act. Upon the reversal of the order of removal, it was as though it had never existed. *Pittstown*, then, as regards any other town, had an original right to make an order of removal. The pauper having come to reside in *Pittstown*, no matter how, was likely to become chargeable; and then the statute confers the authority on the overseers to make application to the justices, who may thereupon make an order. I still think, that it ought to have been made the duty of the overseers of the poor of a town from which a pauper has been removed, on quashing the order by the Sessions, to take back the pauper, at their own expense; and that it is unjust to leave the town, having a *pauper improperly laid at their door, to take measures, at their peril, as regards other towns, to find out his settlement; but this is a *casus omissus* in our statute book. In the case of the inhabitants of *Chalbury* and *Chipping Farrington*, (2 *Salk.* 498.) *Holt*, C. J., was of opinion, that the town appealing from an order of removal, after it was reversed, had a right to send the pauper back to the town from whence he was removed. If so, then *Pittstown* was not without the means of relieving herself from this order of removal. Upon the whole, as it now appears, that the pauper was not settled in *Plattsburgh*; that he had a legal settlement in this state; that *Pittstown* could either have sent him back to *Plattsburgh*, or made a new original order on the town of *Hoosick*, for his maintenance; and as the proceedings on the part of *Plattsburgh* must be regarded as *bona fide*, and the statute does not create or impose upon that town the duty of taking back the pauper, I am of opinion that the defendants must have judgment. This conclusion renders it unnecessary to examine several other points raised in the course of the argument.

Judgment for the defendants. (a)

(a) *Vide Mott v. Hicks*, 1 *Coven's Rep.* 513. *ante*, 122. *Olney v. Wickes* *Tob v. Birdsall*, 1 *Coven's Rep.* 260, 673. *Flower v. Allen*, 5 *Coven's Rep.* 658.
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VAN HAGEN *against* VAN RENSSELAER.UTICA,
October, 1820.VAN HAGEN
v.
VAN RENSSELAER.There was a
special agree-
ment in writing
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between *R.* and
H. relative to
the sale and ex-
change of two
farms, in which
it was stipulat-
ed, among other
things, that *R.*
was to be al-
lowed ten dol-
lars per acre
of the price of
the farm occu-
pied by *H.* as
an equivalent
for the release
of all claims to
it by *R.* The
parties, after-
wards, endorsed
on the contract,
an agreement
that the price
which *R.* was
to pay and *H.*
was to receive
as the price of
his farm, should
be forty dollars
per acre. *Held*,
that the stipula-
tion endorsed,
was not an ab-
solute indepen-
dent contract
in itself, but
was a modifica-
tion, only, of
the original
contract to
which it refer-
red; and both
were to be tak-
en together as
one instrument,
and to be con-
strued accord-
ing to the in-
tent of the par-
ties, to be col-
lected from the
whole contract;
and there being
no ambiguity in

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the agreement,
parol evidence
was inadmissi-
ble to explain it.
The agreement
endorsed, there-
fore, was not

THIS was an action of assumpsit. The declaration con-
tained counts on a special agreement, and for goods sold and
delivered, and the common money counts. The defendant
pleaded *non assumpsit* and payment. The cause was *tried at
the *Columbia* circuit, in *December*, 1819, before Mr. Justice
Van Ness. After the evidence was closed, the judge declared
his opinion on the questions raised by the counsel, and the plain-
tiff tendered a bill of exceptions. The jury found a verdict for
the defendant. The cause was submitted to the court, with-
out argument, on the record and bill of exceptions.

All the material facts are stated in the opinion of the court.

PLATT, J., delivered the opinion of the court. This is an
action on a special written agreement for the sale and exchange
of two parcels of land, dated the 18th of *November*, 1814. The
contract is very complicated in its provisions; but so far as is
material to the questions now before us, I consider the sub-
stance and legal effect of the instrument to be as follows:
Van Rensselaer contracted to sell and convey to *Van Hagen*
a tract of land, called the *Green River* farm, for 6,000 dollars.
Van Hagen then occupied a farm at *Kinderhook*, which *Van*
Rensselaer claimed; and the title was in dispute between them.
It was agreed, that the farm so possessed by *Van Hagen*,
should be sold on an execution in favor of one *Borland*, on the
1st day of *April* then next, if it could not, in the mean time,
be sold at private sale; the defendant (*Van Rensselaer*,) en-
gaging to bid at least 30 dollars per acre, if sold at sheriff's sale.
And in order that there might be no sacrifice on account of the
disputed title, it was stipulated, that *Van Rensselaer* should
unite in the conveyance, so as to vest a clear title in the pur-
chaser; and to complete the compromise, it was further agreed,
that upon the sale of the farm, in either mode, 10 dollars per
acre of the price of the disputed farm, should be paid or ac-
counted for by *Van Hagen* to *Van Rensselaer*, as an equivalent
for the release of *Van Rensselaer's* claim. *Van Rensselaer*
engaged to pay off the execution of *Borland* against *Van Hagen*;
and then an account was to be stated between these parties, as
follows, viz.: *Van Hagen* to be made debtor, 1. For the *Green*
River farm, 6,000 dollars; 2. Amount to be paid by *Van Rens-*
selaer, on *Borland's* execution, and other incumbrances; 3.
Ten dollars per acre, *on the sale of *Van Hagen's* farm; and
he was to be credited for the whole amount of the price of his
farm as sold under the agreement; and each party was to be
responsible for the eventual balance of the account.

On the 21st of *December*, 1814, the parties made, and sub-
scribed the following stipulation, on the back of the original

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LAER.

that R. was to
pay H. absolutely,
40 dollars per acre
for his farm,
but that price
subject to the
deductions
mentioned in
the original agreement.

agreement, to wit: "We agree, that the price to be paid to, the within named, *Jacob (Van Rensselaer)*, and to be received by the within named *John, (Van Hagen)*, as the price of his farm, shall be 40 dollars per acre." The farm of *Van Hagen*, containing 346 and 3-4 acres, was, accordingly, conveyed to *Van Rensselaer*. The commutation for *Van Rensselaer's* claim, at 10 dollars per acre, amounted to 3,467 dollars and 50 cents. The object of this suit is to recover a balance claimed by the plaintiff, under that special agreement. At the trial a question arose, whether the plaintiff had a right to claim 40 dollars per acre, for his farm, over and above all allowance for the commutation for the defendant's claim to the land; or whether 10 dollars per acre, in favor of the defendant, was to be deducted from the price of 40 dollars per acre. The judge expressed an opinion in favor of the defendant, upon the legal construction of the original contract, and the memorandum endorsed thereon; but for greater caution, and in order to present more fully every fact relating to the merits of the case, which could, in any view, be material, he admitted parol evidence to explain the intention of the parties, in regard to the equivocal terms of the endorsement, and he put it to the jury to find specially, as to that fact.

To this opinion of the judge, and to the admission of such evidence, the plaintiff's counsel excepted; and we are now to revise the proceedings at *nisi prius*.

It cannot, I think, be doubted, that the stipulation endorsed was not an entire contract, in itself, but must be considered as a modification merely of the original agreement to which it refers. Both together form one contract, in the same sense as if they had been incorporated in the same instrument. That construction is to prevail, which is consonant to the general intent, as it appears in the whole context. If the endorsement be construed literally, **per se*, it would imply an absolute and unqualified sale of the farm by the plaintiff to the defendant, for which the purchaser was to pay a price in cash, at the rate of 40 dollars per acre. But, in this case, it would be very absurd to suppose, that such was the intention of the parties. The price of the farm was to be carried to the credit of *Van Hagen*, on account. "*Verba generalia restringuntur ad aptitudinem rei.*" The parties, in the endorsement, spoke in reference to the terms of the original agreement; and when they said "*the price to be paid,*" and "*to be received,*" shall be 40 dollars per acre, I understand them to mean, that instead of waiting till the 1st of April ensuing, to ascertain the price of *Van Hagen's* farm, by a sheriff's sale, or by a private sale to a stranger, as contemplated and provided for in the original agreement, the parties chose to fix the price, by mutual consent, at 40 dollars per acre; and *Van Hagen*, accordingly, conveyed his farm to *Van Rensselaer* at that price, subject to all the provisions of the original agreement, as to the exchange of farms, and the

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LAER.

deduction of 10 dollars per acre, for the claim of *Van Rensselaer*, leaving the account between them to be settled upon the terms first agreed on. The price of 40 dollars per acre, "to be paid" by *Van Rensselaer*, and "to be received" by *Van Hagen*, means, that *Van Hagen* was to be credited with that sum, as the price of his farm, in the account, as proposed to be stated, in the original agreement.

In the words of a learned author on the law of contracts, (*Powell*) "the matter in hand is always presumed to be in the mind and thoughts of the speaker, though his words seem to admit a larger sense: and therefore the generality of the words used, shall be restrained by the particular occasion." Where *A.* had a judgment against *B.*, and *B.* gave a legacy to *A.* and died; *A.* on the receipt of the legacy, gave the executor of *B.* a release in these words, "I acknowledge to have received of *C.* five pounds, left me as a legacy by *B.*: and I do release to him all demands which I, against him, as executor of *B.*, can have, for any matter whatsoever;" it was adjudged that the general words "all demands whatsoever," should be restrained, so as to apply to *the legacy only, and not to include the judgment. (*Knight v. Cole, Equ. Cas. Abr. 170.*)

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Upon a careful examination of the contract and endorsement, I am of opinion, that the judge, at the circuit, ruled correctly, in regard to the legal construction of the whole agreement. In my judgment, there is no such ambiguity in this contract as will justify the admission of parol evidence to explain the intent. The case presents a prolix and difficult question as to the legal sense of the two parts of the written contract; and it is a question of construction, which belongs exclusively to the province of the court. The finding of the jury, however, upon the question of fact specially submitted to them, is, in this case, immaterial and harmless. Their verdict (for the defendant) must have been the same, if they had been guided solely by the opinion of the judge on the question of law, independent of the parol evidence which was objected to.

I am, therefore, of opinion that the defendant is entitled to judgment, and that is the opinion of the court.

Judgment for the defendant.

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CASES

ARGUED AND DETERMINED

IN THE

Supreme Court of Judicature

OF THE

STATE OF NEW-YORK,

IN JANUARY TERM, 1821, IN THE FORTY-FIFTH YEAR OF OUR
INDEPENDENCE.

*JACKSON, *ex dem.* VAN BUREN, *against* MYERS. (a)

A conveyance made with intent to defeat the recovery by a third person for damages in an action then pending for a tort, and before trial and judgment, is fraudulent and void, within the statute against frauds. (Sess. 10. ch. 44. s. 2. 1 N. R. L. 75. 2 Rev. Stat. 135. 137.) (a)

THIS was an action of ejectment, tried at the *Columbia* circuit, before Mr. Justice *Yates*, in *November*, 1818.

John W. Morse recovered a judgment in this court against *Roger Adsit*, in an action of slander, tried at the *September* circuit, 1816, for 734 dollars and 43 cents, which was docketed in *November* following. The premises in question, consisting of a house and lot of land of about four acres, and another lot of about twenty acres, which were in the possession of *Adsit*, at the time the above-mentioned suit was brought, were seized by virtue of an execution issued on the judgment in favor of *Morse*, and sold by the sheriff to *J. Minard*, by a deed, dated the 24th of *April*, 1817, for fifty dollars, under whom the plaintiff claimed. The whole of the property was worth about 1,000 dollars.

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(a) Vide *Jackson ex dem. Hooker, v. Mather*, 7 Cow. Rep. 301. *Jackson ex dem. Van Wyck, v. Seward*, 5 Cow. Rep. 67.

*The defendant gave in evidence three several deeds from *Adsit* to him, all dated the 26th of *August*, 1816, for different parcels of the premises in question. The amount of the consideration expressed in the deeds was 1,500 dollars. It was proved, that these deeds were executed and delivered a few days before the Circuit Court, at which the cause of *Morse v.*

(a) This case was submitted to the court, without argument, and decided in *October* term, 1819, but not reported. In *August* term last, the case of *Jackson, ex dem. Ruggles and Hooker, v. Swann*, presented the same question, when the court, referring to their decision in *Jackson v. Myers*, stopped the counsel, (*P. Ruggles*,) and gave judgment for the plaintiff. The opinion of the court, in the latter cause, has since been obtained, but too late to be inserted with the cases of the last term.

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Adsit was tried. *Adsit*, at the same time, gave a bill of sale of all his personal property. He remained on the farm until June, 1817, and has since been in prison, within the liberties of the gaol. No money was paid when the deeds were delivered; but notes were given for the amount of the consideration, payable in three annual instalments. It was generally known, at the time, that the cause of *Morse v. Adsit* was to be tried at the September circuit, in 1816; and the witness had no doubt that the defendant knew that the trial was to come on when the deeds were executed. In the spring of 1817, the defendant paid *Adsit* 100 dollars, to enable him to pay off a judgment against him, in favor of *P. Livingston*. The defendant was present when the lessor of the plaintiff purchased the farm in question, and forbade the sale, and offered to show his title. There was a mortgage on the property for about 175 dollars.

It appeared, that the defendant was a farmer of considerable property, possessing a farm of 300 acres, worth above 4,000 dollars.

The judge declared his opinion, that the deeds from *Adsit* to the defendant were fraudulent and void; and the jury, under his direction, found a verdict for the plaintiff.

A motion was made to set aside the verdict, and for a new trial, which was submitted to the court, without argument, on a case, as above stated.

Van Buren, for the plaintiff.

Vanderpool, for the defendant.

WOODWORTH, J., delivered the opinion of the court. The question arising in this cause is, whether the deeds from *Adsit* to *Myers*, were made with intent to delay, hinder, or defraud creditors, or others, of their just and lawful actions, debts, damages or demands. The facts stated in the case leave no doubt on my mind, that the purchase was made and carried into effect, for the purpose of placing *Adsit's* property beyond the reach of any judgment or execution which *Morse* might obtain in the action of slander then pending.

But, it is contended, that as *Morse*, the plaintiff in the execution against *Adsit*, had no debt or demand against him, at the time the conveyance was executed to the defendant, but merely an action in *maleficio* pending, the deeds from *Adsit* to the defendant cannot be considered fraudulent, within the purview of the statute for the prevention of frauds. The opinion of a majority of the court, in *Mountford v. Ranie*, (*Keb. 99. Roberts on Fraud. Conv. 455.*) was, that a conveyance may be fraudulent, although the plaintiff had only become a creditor by the escape of a prisoner, although the bond on which the judgment was obtained, was long subsequent to the conveyance. In *Luckner v. Freeman*, (*1 Eq. Cas. Abr. 149.*)

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though the court upheld a conveyance intended to secure the payment of honest creditors, made before the trial of a cause founded in *maleficio*, yet the plaintiff, in the suit, was let in upon the surplus, after the debts were paid. In *Courper*, 434, Lord Mansfield said, the statutes of 13 and 27 *Eliz.* could not receive too liberal a construction, or be too much extended in suppression of fraud; and it is now perfectly well settled, that every kind of fraud is equally cognizable at law, as in equity. In *Twyne's* case, (3 *Co. Rep.* 82.) it is said to have been resolved by all the barons, "that the statute of 13 *Eliz.* c. 5. extends not only to creditors, but to all others who had cause of action, or suit, or any penalty or forfeiture." In the case of *Jackson v. Ham*, (15 *Johns. Rep.* 262.) it never was intended to decide this question. The chief justice, in delivering the opinion of the court in that case, says, "that the deed from *Wendell C. Ham* to his father, was not made with intent to defraud *Van Alen* of his lawful action, but must be considered as the mere reconveyance of an estate, conveyed for temporary purposes, and intended and expected to be reconveyed; and that, in considering whether the *conveyance was fraudulent, we have a right to regard the prior deed, which we find to have been entirely gratuitous."

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On a review of the cases, and considering the broad expressions in the statute, (1 *N. R. L.* 75. 2. *Rev. Stat.* 135. 137.) that conveyances to "defraud creditors and others, of their just and lawful actions, damages, and demands," are void, I think it is competent for the lessor of the plaintiff, who purchased under the execution of *Morse v. Adsit*, to object, that the deeds relied on by the defendant are fraudulent and void, on the ground that the action of *Morse v. Adsit*, although founded in *maleficio*, is within the spirit, words, and meaning of the statute, and, consequently, that the plaintiff is entitled to judgment.

Judgment for the plaintiff.(a)

(a) In *Fox v. Hills*, (1 *Day's Conn. Rep.* 295.) the Supreme Court of Errors of *Connecticut* (in 1815,) were of opinion, that such a conveyance was fraudulent and void at common law; and four of the judges were of opinion, that it was void within the statute of that state against fraudulent conveyances, the language of which is different, and not so broad as our statute, which is copied from the *English* statute, 13 *Eliz.* ch. 5.

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January, 1821.PELLETREAU
v.
RATHBONE.PELLETREAU *against* RATHBONE and others, *terre-tenants* of MEDCEF EDEN. (a)GRIFFIN *against* SHONNARD and others, *terre-tenants* of EDEN.

THESE were actions of *debt* for legacies, brought in *October*, 1816, to recover legacies charged on land, by the will of *Medcef Elen*, deceased, against the *terre-tenants* of the land, of which the testator died seised; and tried at the *New-York* Sittings, in *October*, 1819, before Mr. Justice *Woodworth*.

All the defendants (twenty-four in number) were returned, summoned, and declared against jointly. Most of them did not plead, and the plaintiff, in each of the causes, entered *a *nolle prosequi* or *retraxit*, against those who neglected to plead.

As soon as the plaintiff's cause was opened, the counsel for the defendants objected,

1. That no action at law could be maintained against a *terre-tenant* for a legacy; at least, not without an express promise to pay by him, which was not pretended; and,

2. Because, it appeared, on the record, that a *nolle prosequi* had been entered against several of the defendants; and this being a joint action, a *nolle prosequi* as to some of the defendants was, in effect, a discontinuance, or *retraxit*, as to all. On these grounds, the defendants' counsel moved for a nonsuit. But the judge refused the motion, reserving the questions for the consideration of the court.

The plaintiff then introduced the will of *Medcef Eden*, dated the 29th of *August*, 1798, by which, after devising the bulk of his estate to his two sons, *Joseph* and *Medcef*, he bequeathed as follows: "I will and direct, that my executors hereinafter named, shall pay into the proper hands of my loving wife, *Martha*, five hundred dollars, during her life, &c., in four equal payments, &c. to be paid to my said wife's own hands, for her separate use, and not into the hands of an assignee, or any other person, &c.; my intention being, that the said sum of 500 dollars shall be for her personal and separate benefit, and for her certain maintenance, at all events, and not in her power to sell, assign, or in any way dispose of, or incur the same; and I charge all and singular, my real and personal estate, with the payment thereof. And I do hereby expressly declare, that the same is given in lieu, satisfaction, and bar of any dower that my said wife may, by law, be entitled to, on all and singular, my estate, or any part thereof." "Item, I give to *John Pelletreau*, (plaintiff,) of the city of *New-York*,

No action at law lies for a legacy. (a)

And where an annuity for life is expressly charged on the real and personal estate of the testator, an action at law

[* 429] cannot be maintained against the heirs or *terre-tenants*.

The proper remedy for a legacy is in the Court of Chancery.

(a) Vide *Kelsey v. Dwyer* 3 Conn. Rep. 136. *Tole v. Hardy*, 6 Conn. Rep. 333.

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merchant, *Susannah Pelletreau* of the same place, *Jane Gallilee*, wife of *Matthew Gallilee*, 125 dollars each, during their several lives, to be paid in the same manner as the annuity herein given to my wife. I also charge, all and singular, my real and personal estate, with the payment thereof." "It is my will, and I do hereby manumit, and set free, my negro slave, *Hannah Palmer*, (now *Griffin*, plaintiff,) *and direct my executors, &c. to pay her 100 dollars a year, during her life." The testator died in *August*, 1798, and his two sons qualified as executors, in *December*, 1798, and both have since died.

The defendant again moved for a nonsuit in the second cause, for the causes above mentioned, and because the legacy to *Hannah Griffin* was not charged on the land of the testator; and, also, on account of the lapse of time, from the death of the testator to the bringing of the action. The judge directed a verdict to be taken for the plaintiff, in each cause, subject to the opinion of the court on a case, as above stated, with liberty to either party to turn the same into a special verdict, on a bill of exceptions.

Burr, for the plaintiffs.

Griffin and *Talcot*, for the defendants.

The counsel for the plaintiff having stated the case and the points, *The Court* said, that they did not wish to hear any arguments; that the question was clearly settled, that no action could be maintained at law for a legacy, and that the defendants were entitled to judgment. (a)

Judgment for the defendants.

(a) The following authorities were noted by the counsel: For the defendants: *Dicks v. Strutt*, 5 Term Rep. 690. *Beecher v. Beecher*, 7 Johns. Rep. 99. *Livingston v. Executors of Livingston*, 3 Johns. Rep. 189. *Van Orden v. Van Orden*, 10 Johns. Rep. 30. 2 *Woodeson*, 478. *Hobart*, 265. *Webb v. Jiggs*, 4 *Maule & Selwyn's Rep.* 113. 2 *Salk*. 215. note by *Evans*, as to the dictum of *Lord Holt*, in 6 Mod. 26. 1 *Tidd's Pr.* 632. 1 *Wils.* 89. 1 *Chitty Pl.* 32, 33. 3 *Exp. N. P. Rep.* 76.

For the plaintiffs: 6 Mod. 26. *Anon.* per *Holt*, Ch. J., 4 *Burr*. 2381. 3 *Com. Dig. Debt*, (A.) *Cor ip.* 291. 2 *Johns. Rep.* 243. 3 *Johns. Rep.* 189.

[* 431] *JACKSON, *ex dem.* VAN RENSSELAER, against ANDREW.

If a tenant does an act, proper in itself, he cannot be made a wrong doer, by a consequence

THIS was an action of ejectment, tried at the *Herkimer* circuit, in *June*, 1819, before Mr. Justice *Yates*. The defendant held, under a lease for lives, from *Philip Schuyler*, dated the 6th of *September*, 1790. The lessor reserved, among

other things, all mines, and "all creeks, kills, streams and runs of water, and as much ground, within the premises, which he might think requisite to appropriate, at any time thereafter, to the erection of mills, mill-dams, and any works and buildings whatsoever for the convenient working of the mines, or for the use of the mills; and, also, lands that may, by such dams, be overflowed with water, and also such wood, firewood and timber, &c. It was conditioned on the part of the lessee, that he, or his executors, &c. should not, at any time thereafter, erect, or permit, or cause to be erected, any mill or mill-dam, or any other work or building whatsoever, upon any kill, creek, stream, or run of water within the premises; and that neither he, or they, should, at any time thereafter, commit any waste." And it was expressly covenanted and agreed, that in case the lessee, &c. did not perform, &c. all the covenants and conditions in the lease, on his part to be performed, &c. it should be lawful for the lessor, his heirs, &c. to re-enter, &c.

The lessor of the plaintiff was the assignee of the reversion. It was proved, that the defendant, about 17 years before the trial, caused a ditch about six feet wide, and about four deep, to be dug for the distance of about twenty rods, and made a dam across the creek, communicating with the *Mohawk* river, by which means it was diverted from its ancient channel, and more water thereby flowed into a swamp, which had been previously covered with timber. When the defendant first took possession of the farm, it was wild land, and he cleared all of it, except this swamp, in which there was large timber growing, and which was the only timber reserved on the farm. The timber, afterwards, died, *owing, as some of the witnesses believed, to letting in more water from the creek upon the swamp by means of the ditch dug by the defendant. Other witnesses thought that the decay was owing to the blowing down of trees, &c. There was a difference of opinion among the witnesses, as to the effect of the water flowing into the swamp, on the timber. It appeared, also, that after the old timber had decayed, new trees, of a different and better kind, had grown up, which, in a few years, would be more valuable, as timber, than the old. The lot leased to the defendant contained about 110 acres, and the swamp, which was the only wood land reserved, contained about 25 acres, which is about the usual proportion of wood and timber, on farms of that size, in that part of the country. Some of the witnesses thought the young timber, in its present state, was worth more than the old timber before it decayed. It was proved, also, that a number of years ago, the defendant had made a brick yard on the premises, and made brick, for which purpose the clay had been dug out of the meadows on the premises; but, after making a few thousand bricks, the defendant desisted, not finding it to answer his purpose.

The judge charged the jury, that there did not appear to be

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which he could not anticipate. As if, by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it will not be deemed waste, so as to produce a forfeiture of a lease; especially, when the landlord has lain by for twenty years, during which time, new trees had grown up, of more value than the old, and, therefore, no permanent injury had been done to the inheritance.

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sufficient evidence to show, that the decay of the timber had been caused by the defendant's turning the course of the creek; but if that were the case, it was of no consequence, as it clearly appeared, that the growth of new timber was more valuable to the lessor than the old, and that it was a benefit, rather than an injury to the farm; and that what the defendant had done, in this respect, ought not to be deemed a breach of the covenant in the lease. That the attempt to make brick, was a matter too insignificant to constitute waste, for it could produce no essential injury to the inheritance. The jury found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial.

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Talcot, for the plaintiff, contended, that the digging the new channel for the creek, even if it had not been the cause of the decay of the timber, was waste; for, digging up the soil, for any purpose, except that of cultivation, is waste. * (*Co. Litt.* 53. b. 2 *Roll. Abr.* 816. *Owen*, 66.) So turning the creek across the meadow, is waste. Suffering a wall of the sea to be in decay, so that, by the flowing of the sea, the meadow or marsh is surrounded, and rendered unprofitable, is waste. (*Co. Litt.* 53. b.) So, turning arable into wood land, or *e converso*, or meadow into arable, whereby the course of husbandry is changed, is waste. (*Co. Litt. uti supra. Hob. Rep.* 234.) Again; erecting a dam across the creek, was a breach of the express covenant in the lease, not to build, or erect any mill, mill-dam, or any other work or building whatever. The terms, other "work or building," will include this dam. (16 *Johns. Rep.* 14. 22.)

Again; the neglect to preserve sufficient wood and timber for the uses of the farm, was waste. (7 *Johns. Rep.* 227. 233.) It makes no difference that the new growth of timber was better than the old. The question of waste does not depend upon that. The tenant has no right to take upon himself to judge what may be an improvement, or not, of the estate of the reversioner. He must be confined to the conditions of his lease. (*Dyer*, 65. a. *Cro. Jac.* 182. 1 *Lev.* 309.) Besides, the young trees now growing, are not, as this time, of any value. They are not timber, nor are they fit for fuel, or any of the uses of the farm.

Gold and Sill, contra. The creek, the water of which the defendant turned, was not a mill-stream, nor could it be used for any purpose but that of irrigation. Waste is an act done to the injury of the freehold. (7 *Johns. Rep.* 732.) It must be a permanent injury to the reversioner. Now, turning the water of this creek, in the manner it was done by the defendant, was not such an injury. It was necessary to be done for the proper cultivation of the farm. As to the alleged consequence of turning the stream, the killing of the timber in the

swamp, the jury have passed upon it, and their verdict negatives the assertion. So, whether sufficient timber was left by the defendant, for the use of the farm, according to the regular course of husbandry, has been decided by the jury. If a tenant manages his farm in the manner practised by his neighbors, and without any *malice, or intent to injure his landlord, the court will not be disposed rigidly to enforce a forfeiture of his lease. Again; the lessor's reserving sufficient timber to build mills, &c. seems inconsistent with the defendant's reserving timber for the uses of the farm. Until the landlord comes and demands the exercise of the right reserved to him, he has no right to complain. The doctrine of the law of *England*, that changing arable into meadow, &c. cannot, in reason or justice, be applied to a lease of new land in this country. It is indispensable, for the purposes of husbandry, to change the face of the land.

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Per Curiam. This being a hard action, with a view to the forfeiture of the estate, there ought not to be a new trial, unless the jury were clearly misdirected as to the law. The judge, on the trial, stated the fact to be doubtful, whether turning the creek had killed the timber; and by a review of the evidence, he was fully justified in saying so. He added, also, that the fact was of no consequence, for the new growth was more valuable than the old, and so it had been no injury to the inheritance. This we deem to be correct when applied to this case. In *Co. Litt.* (53. a.) the law is laid down, that "if the tenant do or suffer waste to be done in houses, yet, if he repair them before action brought, there lieth no action of waste against him." If, then, the turning the creek produced waste, by the destruction of the timber, twenty years ago, and if the landlord lies by, until the inheritance is benefited by the act, it would be unreasonable to admit him to say, that there was a forfeiture by an act in which he had so long acquiesced, and by which, at the time he sought redress, he was, in truth, benefited. The same remark, in a good degree, applies to the digging the clay for brick: the injury, if any, has long since ceased. It is true, that a tenant cannot, under the pretence of advantage to the reversioner, change the nature of buildings, and many cases show that such changes, though beneficial, would be waste. Indeed, we have little hesitation in saying, that the alteration of the creek, which was obviously an act of good husbandry, if the consequence had been the destruction of the timber in the swamp, would not be waste. *The tenant, in doing an act proper in itself, cannot be made a wrong doer by a consequence which he could not anticipate, or foresee.

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Motion for a new trial denied.

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GIBBS and others against BULL.

On a return of *elongata* to the writ of *retorno habendo*, in replevin, it is not necessary to issue a *scire facias* against the pledges, but the defendant, if insufficient pledges are taken, or no pledges at all, may have his action on the case against the sheriff. (a)

Where the declaration against the sheriff is under the eighth section of the statute, (1 N. R. L. 91. sess. 11. ch. 5. 2 Rev. Stat. 523—4. § 7.) which applies only to distresses for rent, the [* 436]

plaintiff cannot claim damages, beyond the value of the goods eloiigned; for the security required by this section, is only for the prosecution of the suit, and for the return of the goods, &c.

The declaration against the sheriff, must allege that a writ of *retorno habendo* had been issued and *elongata* returned, or it is bad on demurrer.

It must, also, pursue the words of the statute, and allege that the sheriff made de-

THIS was an action on the case, brought against the defendant, late sheriff of the county of *Washington*, for not taking sufficient security, pursuant to the statute, in executing a plaint in replevin, in favor of *E. Rowley* against the plaintiffs. The declaration contained four counts, to the first, second, and fourth of which there were separate demurrers. The first count alleged, that the defendant, as sheriff, replevied certain goods in possession of the plaintiffs, and caused them to be delivered to *Eldridge Rowley*, the plaintiff in replevin, "without taking sufficient security to prosecute the said suit, or to return the said goods, if a return thereof should be adjudged;" and that, contrary to his duty, he took a bond in his own name, as sheriff, &c. of one *C. R. Colden*, and one *Jacob Holmes*, in the penal sum of 4,000 dollars, "conditioned for the prosecuting the said plaint with effect, and for returning the said goods and chattels, if return thereof should be adjudged." The plaintiffs averred, that the amount of the bond was not equal to double the value of the goods; nor was it sufficient to ensure the return of the goods, and for the prosecution of the suit to effect; nor was the bond executed by the said *E. R.*, the plaintiff in replevin, himself. The plaintiffs further averred, that the sureties were not sufficient for prosecuting the *suit with effect, nor for returning the goods, if a return thereof should be adjudged. That a judgment was rendered in the suit for the plaintiffs, the defendants in replevin, for a return of the goods, and, also, for damages and costs, to the amount of 2,730 dollars and 96 cents. That a writ of *retorno habendo*, and a *ca. sa.* for the damages and costs, were issued to the coroner, (*Gibbs*, one of the plaintiffs, then being sheriff,) who had returned to the *ca. sa.*, *non est inventus*, and *elongata* on the writ *de retorno habendo*.

The third count set out the same proceedings in the action of replevin, to the judgment thereon for a return of the goods and costs, as in the first count, and alleged, that the defendant, as sheriff, had not taken sufficient security to prosecute the suit, or to return the goods, &c. but it did not aver, that a writ of *retorno habendo* had been issued and *elongata* returned.

In the fourth count, the plaintiff alleged, that the sheriff made deliverance on the plaint in replevin, "without taking any pledge or security to the plaintiffs, for the return of the said goods," &c. omitting the words in the statute, "if return thereof should be adjudged."

(a) Vide *Knapp v. Colden*, 4 *Wendell's Rep.* 616. *Gould v. Warner*, 3 *Wendell's Rep.* 56.

Burr, in support of the demurrers, contended, that there was a distinction between the fourth and eighth sections of the statute relative to replevins. (1 N. R. L. 91. sess. 11. ch. 5. 2 Rev. Stat. 523—4. sec. 7.)

The 8th section, which relates to a replevin of a *distress for rents*, and is copied from 11 Geo. II. c. 19. s. 23., directs the sheriff to take "in his own name, from the plaintiff and two sureties, a bond in double the value," &c. The fourth section, which is taken from the statute of *Westm. 2. c. 2. (13 Edw. I. c. 2. s. 3.)* requires the sheriff "to take of the plaintiff sufficient security to prosecute the suit, and to return the same beasts, goods or chattels, if return thereof shall be adjudged," &c. As the sheriff is answerable, by this section, for the sufficiency of the pledges, the sheriff may take such security as he pleases. (*Gilb. on Replevins*, 97. 3d ed. 1 *Lord Raym.* 278. 1 *Saund.* 295. c. note 3. 295. e.) Insufficient pledges are no pledges, within the statute. *Westm. 2. c. 2. (16 Vin. Abr.* 399, 400. *Pledges*, *H. pl. 1. pl. 4, 5. *Rous v. Paterson*, 19 *Vin. Abr.* 19. *Replevin*, Y. pl. 2.) And where the sheriff takes insufficient pledges, *de retorno habendo*, a return is awarded, and the sheriff returns *elongata*, on which a *scire facias* formerly issued against the pledges, to which the sheriff returned *nihil*, and then a *scire facias* issued against the sheriff himself, that he render to the defendant as many cattle, &c. Though the practice is now altered, so that no *capias ad withernam*, or *scire facias*, is issued, and an action on the case is brought against the sheriff, for taking no pledges at all, or insufficient pledges, yet an *elongata* must be returned before there can be any proceedings against the sheriff. (1 *Saund.* 195. a. 195. b. note.)

Again; the writ *de retorno habendo* was directed to the *coroner*, instead of the sheriff.

Foot, contra. The counts in this case are under the fourth section of the act, which prescribes no mode of taking the security. The eighth section prescribes a bond, &c. and makes it assignable; but, under the fourth section, there is no such provision, and the party has no remedy, but by proceeding against the sheriff. It is true, that the sheriff, under this section, may take what security he pleases; but he is bound, at his peril, to see that it is sufficient, and effectual. He should return the pledges against whom a *scire facias* lies. (2 *Shower*, 421. 485. 3 *Mod.* 56. *Cro. Car.* 446.) An action on the case lies against the sheriff for taking insufficient security, and he is responsible for their sufficiency to the end of the suit. (1 *Dallas. Rep.* 349. 13 *Mass. Rep.* 180. 11 *Mass. Rep.* 189. 2 *Mass. Rep.* 517.)

As the third count contains no allegation that the sheriff took a bond, but simply, that he did not take sufficient security, it is clear of all objections. As to the damages, a count for the damage may be joined with the count in trespass or case. (2 *Chitty's Pl.* 296. n. e. f. *Lutwy.* 1259.)

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liverance, &c. without taking security, &c. "to prosecute the suit, and to return the same goods, &c. if return thereof shall be adjudged." Under the fourth section of the statute, [* 437] the sheriff may take such security as he pleases, in his own name, and at his own peril. Though this section does not provide that the sheriff shall assign the bond to the defendant in replevin it seems that the court would compel an assignment of it, for the benefit of the defendant.

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taken on the demurrer to the first count, are, 1. That the facts averred by the plaintiffs, show no neglect of duty *in the defendant, as sheriff; and that the bond set out in the count was taken conformably to the statute. 2. That the statute requires the sheriff to take sufficient security to prosecute the suit, &c. and to return the goods, "if a return thereof should be adjudged;" whereas, the count charges the defendant for neglect of duty, in not taking sufficient security to prosecute, &c. "with effect," "or to return the goods," &c. 3. That the count is defective in stating, that the *retorno habendo*, and *ca. sa.*, were directed to, and returned by, the *coroner*, instead of the *sheriff*.

By the fourth section of the statute, (1 N. R. L. 92. 2 Rev. Stat. 523—4 § 7.) it is provided, that "the sheriff, before he makes deliverance of any beasts, goods or chattels, by virtue of any writ or plaint in replevin, shall take of the plaintiff sufficient security to prosecute the suit, and to return the same beasts, goods, or chattels, if return thereof shall be adjudged; and if any sheriff shall take security otherwise, or neglect to take such security, he shall answer for the price or value of the beasts, goods and chattels," &c. This section is a transcript of 13 Edw. I. ch. 2. s. 3. By the eighth section of our statute, (1 N. R. L. 93.) it is provided, "that in every replevin of a *distress for rent*, the sheriff shall take, in his own name, from the plaintiff, and two sureties, a bond in double the value of the beasts, goods, or chattels distrained, conditioned, for prosecuting the suit with effect, and without delay, and for returning the beasts," &c.; and such bond is made assignable to the defendant in replevin, &c. This latter section is copied from the 17 Car. II. ch. 7. and 11 Geo. II. ch. 19. It is very evident, that the declaration in this case was framed with a reference to the *eighth section*, and not with a view to the fourth section. The count avers, that the goods were seized by these plaintiffs, under authority of an act of Congress. And the eighth section of the statute is applicable only to a replevin of a *distress for rent*. The question, then, is, whether the plaintiff has shown a right to recover under the provision of the fourth section. It seems to be a settled construction, that under the fourth section, the sheriff may take such security as he pleases, in his own name, and at his own peril. (*Gilb. Repl.* 75. 1 *Saund.* 195. and notes. 2 *Mass. Rep.* 517.) The statute *makes no provision, requiring the sheriff to assign the bond, so that the defendant in replevin might sue it in his own name; but, I presume, that if such defendant chooses to avail himself of the bond, this court would compel an assignment *by its own officer*, for the benefit of the injured defendant, and protect his rights, although suing in the sheriff's name. The ancient mode of proceeding was, after an *elongata* returned on the *retorno habendo*, to issue a *scire facias* against the sureties; and if that were not effectual, to issue a *scire facias* against the sheriff, to respond for the

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value of the goods. But the modern practice is, after *elongata* returned, to bring a special action on the case against the sheriff, where he has omitted to take sufficient security. It is important to remark, that the statute does not require security for damages or costs; but merely to prosecute, and to return the goods, if, &c. It appears, therefore, that the first count makes a fatal admission against the plaintiffs, in stating, that the sheriff did take a bond of two sureties in 4,000 dollars, conditioned for prosecuting the plaint, and for returning the goods, &c. Such bond was according to the statute; and the averment, that the sureties were insufficient to ensure a prosecution of the suit "to effect, and for a return of the goods," if true, gives no right of action against the sheriff; because the sureties, contemplated by the statute are not responsible for any damages beyond the value of the goods replevied.

The damages in this case, over and above the value of the goods, were assessed at 2,730 dollars and 96 cents. Now for that sum, these plaintiffs are left to seek satisfaction from *Rowley*, the plaintiff in replevin, and, for aught that is alleged in the count, the sureties taken by the sheriff are ample for the mere value of the goods which are eloigned. I see nothing in the statute that requires the plaintiff in replevin to execute the bond. Besides, I think it a defect in the count that it alleges, that the sheriff did not take security to prosecute the suit, or to return the goods, &c. The security prescribed by the statute, is to prosecute and to return, &c. and the sheriff is expressly forbidden "to take security otherwise." For these reasons, the defendant *is entitled to judgment on the demurrer to the first count. There is nothing in the objection, that the *retorno habendo* was directed to the coroner; because it appears, that pending the replevin suit, Gibbs, one of the plaintiffs, was appointed sheriff, instead of Bull; and, therefore, as the sheriff, for the time being, was a party to the suit, the process was properly and necessarily directed to the coroner.

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The third count sets out the same proceedings in the replevin suit, up to the judgment therein for a return of the goods, and for damages and costs, as in the first count; and charges the defendant, as sheriff, with not having taken sufficient security to prosecute the suit, or to return the goods, &c. But the third count is grossly defective, inasmuch as it omits entirely the essential averment, that a *retorno habendo* had been issued, and *elongata* returned. Such a return is indispensable, in order to charge the sheriff in any form; for *non constat*, but that the defendants in replevin might have had a return of the goods; and if so, the sheriff is not liable, even though he took no security. (1 Saund. 195. and notes. 18 Vin. Abr. 399. *Kindle v. Blades*, 5 Taunt. 227.) The defendant is, therefore, entitled to judgment on the demurrer to the third count.

The fourth count alleges as the *gravamen*, that the sheriff made deliverance on the plaint in replevin, "without taking

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any pledge or security to the said plaintiffs for the return of the said goods," &c., without adding, in the words of the statute, "if return thereof should be adjudged." This averment is defective, and shows no cause of action; because it does not pursue the requisition of the statute. The sheriff may have done his duty, pursuant to the statute, in taking "*sufficient security (in his own name) to prosecute the suit, and to return the goods, &c. if return thereof shall be adjudged;*" and yet, every word in this count may be true. This count is, also, liable to the same fatal objection as the third count, in omitting to aver, that a *retorno habendo* was issued, and returned *elongata*. It merely states the judgment in favor of the defendants in *replevin*; and for aught that appears, they may have their goods, whenever they please to issue their execution for that purpose.

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*The defendant is, accordingly, entitled to judgment on the demurrer to the fourth count also.

Judgment for the defendant accordingly.

JACKSON, *ex dem.* J. B. CLARK, *against* MORSE.

A sale of land, by the comptroller, for taxes, is of no validity, if the taxes were, in fact, paid to the collector; and the deed executed by the comptroller to the purchaser, conveys no title.

The right, or authority to sell, under the act, (sess. 36, ch. 32. 2 N. R. L. 509. 1 Rev. Stat. 407.) is founded on the non-payment of the tax; and the returns made to the comptroller are not conclusive evidence of that fact; though sufficient to justify him in the discharge of his duty, as a public officer, in making the sale.

A purchaser of lands, sold

THIS was an action of ejectment, brought to recover seven acres of land in the south-west corner of lot No. 6, in the gore, in the town of *Oxford*; and was tried at the *Chenango* circuit, in June last, before Mr. Chief Justice *Spencer*.

The plaintiff gave in evidence a deed to him, from *A. McIntyre*, the comptroller, dated the 20th of *December*, 1817. It appeared, that the premises in question were sold to the lessor of the plaintiff, at auction, by the comptroller, pursuant to the act for the assessment and collection of taxes, passed the 5th of *April*, 1813, for the non-payment of taxes, in the years 1811 and 1812.

The defendant proved his title for the south part of lot No. 6., including the premises in question; and that the taxes assessed on the land for 1811 and 1812, were duly paid to the collector of the town of *Oxford*. The plaintiff's counsel objected to the defence; but the chief justice charged the jury, that it appearing, that the taxes for 1811 and 1812, on the land, including the premises in question, were duly paid, the sale by the comptroller was unauthorized; and his deed was, therefore, invalid; and that the defence was good. The jury, accordingly, found a verdict for the defendant.

A motion was made to set aside the verdict, and for a new trial.

Clapp, for the plaintiff.

Vanderlyn, for the defendant.

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at public auction, for the non-payment of taxes, acquires only a *contingent* title, which is liable to be defeated, by proof of the fact, that the tax (for which the land was sold) was paid before the sale.

*WOODWORTH, J., delivered the opinion of the court. The premises in question having been sold and conveyed to the lessor of the plaintiff by the comptroller, for the non-payment of taxes, charged in the years 1811 and 1812, and the defendant having proved, on the trial, that *the said taxes* had been paid to the collector of *Oxford*, in each of those years, the question to be decided is, whether any title was acquired by the plaintiff's purchase?

The sale was made in consequence of a return, that the whole of lot No. 6. was chargeable with the tax. This was a mistake of the assessors; *for that part of the lot, including the premises*, had been assessed separately, and the taxes paid.

The comptroller was justified in selling, for *he* must be governed by the returns before him; the conveyance will be conclusive evidence that the sale was regular.

The statute declares that the conveyance shall vest an absolute estate *in fee simple* in the purchaser; which it does, if the tax has not been paid; but if it has been paid, then no estate passes by the sale, for the statute intended to divest the title of the former owner, for non-payment of the tax, and *for that only*; and it must be so construed. The title acquired by the purchaser is contingent, so far as it may be affected by establishing the fact that the tax had been paid before the sale was made. This is an implied condition annexed to every grant of this kind, founded on a sound construction of the law, with which the purchaser is presumed to be acquainted;—he purchases subject to this risk, and if his title is defeated, he must look to the state for the relief which such a case requires. By the 17th section of the act, (2 *N. R. L.* 515. 1 *Rev. Stat.* 407.) the tax laid is declared to be a lien on the land; and, if not paid within a certain time, the comptroller is authorized to sell. The right to sell is founded upon the fact of non-payment; the returns made to the comptroller are not conclusive *evidence of the fact*, but only *prima facie*, and such as will justify him, as an officer, in the discharge of his duty. The *validity* of the sale and conveyance are necessarily to depend on the contingency of non-payment; when this is drawn in question, it is competent to prove payment, and by so doing, no rule of law is violated; *it is not permitting parol evidence to impugn or destroy a written contract, but is consistent with the deed; and if the deed is thereby defeated, it arises upon the proof of a fact, upon which, by law, the operation of the deed was made to depend, at the time it was executed.

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The principle laid down in the case of *Stead's Executors v. Course*, (4 *Cranch*, 403.) applies to the present case. The question was, whether the collector had acted in conformity to the law from which his power was derived, and it was decided, that it was incumbent on the vendee to prove the authority

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to sell. The court say, "it would be going too far to say, that a collector, selling land with, or without authority, could, by his conveyance, transfer the title of the rightful proprietor."

I understand this, as applying not only to a case where the officer deviates from the course prescribed by the law, but, also, where he has acted regularly according to the facts before him; yet, upon subsequent inquiry, it is ascertained, that the tax supposed to be due, and which alone authorizes a sale, has been satisfied.

Motion for a new trial denied.

LEWIS and Wife against BABCOCK.

A declaration in trespass, by husband and wife, for a personal injury to the wife, containing, also, a cause of action, for which the husband alone might sue, as the loss of her company and assistance, in consequence of [* 444] the battery, &c. is good, after verdict, though it would be bad on demurrer.

THIS was an action of trespass and assault, &c. The declaration, after stating, that the defendant drove a sleigh, on the highway, with great force and violence against the sleigh in which the plaintiff, *L.*, and his wife, were riding, and run one of the shafts of the defendant's sleigh, into the plaintiff's sleigh, and struck his wife, and broke her arm, &c., added "whereby also, during all that time, he, the said *H. L.*, was deprived of all the comfort, benefit and assistance of the said *N.*, his wife, in his domestic affairs, which he might, and otherwise would have had; and thereby, also, he, the said *H. L.*, was then and there forced, and obliged *to pay, lay out and expend, and hath necessarily paid, laid out and expended, divers sums of money, in the whole amounting to 500 dollars, in and about endeavoring to heal and cure the said *N.*, his wife, of the sickness, soreness, lameness and disorder aforesaid, occasioned by the assault, beating, &c. aforesaid." The defendant pleaded not guilty. On the trial, the jury found a verdict for the plaintiffs, generally.

The defendant moved in arrest of judgment, on the ground, that the declaration contained a substantive cause of action for the husband alone, and which is material to the damages, and which ought not to have been joined with the assault and battery of the wife.

Kirkland, for the defendant. He cited, 1 *Chitty Pl.* 61. 2 *Chitty Pl.* 374. notes *o. r.* *Lord Raym.* 1208. 1031. 1381. 2 *Johns. Cases*, 17.

Campbell, contra, cited 1 *Salk.* 119. *Lord Raym.* 1031. S. C. 2 *Str.* 1094. and relied on *Russell* and *Corne*, as in point. *Holt*, Ch. J., in that case, said, that he would not intend that the judge allowed any evidence to be given as to the special damage to the husband. *Chitty (on Pl. 62.)* says, though the declaration would be bad on demurrer, it is good after verdict.

Per Curiam. There is no doubt, that upon *demurrer*, the objection would prevail; but we incline to the opinion, that it is not good, in arrest of judgment.

Chitty says, (1 *Chitty Pl.* 61.) "if the action be brought for the personal suffering, or injury of the wife, the declaration ought to conclude to *their damage*, (husband and wife,) and not to that of the husband alone, for the damages will survive to the wife, if the husband die before they are recovered; and care must be taken not to include in the declaration any statement of a cause of action, for which the husband alone ought to sue." In *Russell and wife v. Corne*, (1 *Salk.* 119. and note,) the husband and wife sued for the battery and false imprisonment of the wife, *per quod the husband's business remained undone*. And after verdict, there *was a motion in arrest of judgment; but *Holt*, Ch. J., said, "I will not intend the judge suffered that to be given in evidence;" and the plaintiffs had judgment. (2 *Lord Raym.* 1031. 2 *Chitty on Pl.* 374. notes o. and r. *Smalley v. Kerfoot and wife.* *Stra.* 1094.) In *Todd and wife v. Bedford*, (11 *Mod.* 264.) for assaulting the wife, and driving a coach over her, and *that the husband laid out money in her cure*, a motion in arrest was denied. It seems, after verdict, that where there is a proper cause of action in the wife, though circumstances are added, which are actionable by the husband only, the declaration is good by husband and wife; and the additional circumstances are only regarded as matter of aggravation. In *Staunton and wife v. Hobart*, (*Sid.* 224. *Keb.* 784.) trespass for beating the wife, and tearing her coat, *ad damnum ipsorum*, was held bad *after verdict*. But that ancient case stands opposed by a current of subsequent decisions, which are reviewed in the notes to *Russell and wife v. Corne*, (1 *Salk.* 119. 6th ed. by *Evans*.)

Upon the whole, we think the plaintiffs are entitled to judgment on the verdict.

Judgment for the plaintiffs.

P. S. SMITH *against* E. and J. ALWORTH.

DEBT on a bond, conditioned, that whereas the plaintiff had obtained a judgment against *J. A.*, defendant, before *Nehemiah Huntington*, Esq., (a justice of the peace,) for 44 dollars and five cents, on a verdict; that if the said *J. A.* should prosecute his appeal from the said judgment, with all due diligence, to a decision in the Court of Common Pleas of *Madison* county, and pay the said judgment, together with the interest thereon, and the costs of such appeal, in case judgment be had thereon *uninst him*," &c.

The defendant, after craving *oyer* of the bond, condition,

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A defendant who craves *oyer* of a deed, is entitled to a copy of the attestation, and names of the witnesses.

A defendant who is entitled to *oyer*, cannot be compelled to plead without it. But if he elects to answer, it is a

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waiver of the
objection that
the names of
the witnesses
were not given
in the oyer, and
cannot be a
ground of de-
murrer to the
declaration.

*and an endorsement thereon, in these words: "I approve of the security within given, *Nehemiah Huntington*, justice of the peace," demurred to the declaration, and assigned for causes of demurrer: 1. That it did not appear, that the bond was executed in the presence of any witnesses; 2. That it did not appear, that the money mentioned in the condition of the bond, was to be paid to the plaintiff; 3. That it did not appear, that the judgment was obtained before *N. H.*, by virtue of, or pursuant to, any law of the state. There was a joinder in demurrer, and the cause was submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. The first cause of demurrer is, that it does not appear that the bond was executed in the presence of any witness. A defendant, who prays oyer of a deed, is entitled to a copy of the attestation and names of the witnesses, as well as every other part of the deed. (1 *Tidd Pr.* 527. *Willes*, 288.) And where the defendant is entitled to have oyer, it cannot be dispensed with by the court; nor can he be compelled to plead without it. (1 *Tidd Pr.* 528.) (a) But the defendant cannot avail himself of this objection on demurrer. He was not bound to plead until the names of the witnesses were given; but if he elects to answer, it is a waiver of the objection, and the court will presume that the bond was well executed.

The remaining causes of demurrer appear to be frivolous. The money in the condition was payable to the plaintiff, by necessary intendment, he having obtained a judgment against *James Alworth*, and the condition being to pay the same, with interest and costs.

This court will presume, that the judgment set out in the condition, is a valid judgment, until the contrary appears, and that the bond was legally taken on an appeal to the Common Pleas. The condition is in the words prescribed by the act to extend the jurisdiction of justices of the peace, sess. 41. ch. 94. sec. 17.

[* 447] The endorsement by the justice, approving the security, *is admitted by the demurrer, and must be considered as made in pursuance of the directions of the act.

The plaintiff is entitled to judgment, and the defendants have leave to plead *de novo*, in twenty days, on payment of costs.

Judgment for the plaintiff.

(a) Vide 1 *Dunlap's Pr.* 399. 340

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CONKLIN.

REMSEN, surviving Executor of R., against CONKLIN.

THIS was an action of covenant for the non-payment of rent. The declaration was on a lease of a lot of land in *Oneida county*, from the executors of R., to one *James Farr*, who assigned the same to the defendant, dated the 19th of *August*, 1794. The covenant was as follows: "Yielding and paying, &c. yearly, and every year, (after four years from the 1st of *August*, 1794,) upon the first day of *February* in every year, at such place in the city of *Albany*, as the said parties of the first part, their heirs or assigns, shall, for that purpose, from time to time, appoint, the yearly rent of ninety-two bushels, and four fifths of a bushel, of good merchantable winter wheat." The plaintiff averred, that after the making of the lease, and the assignment to the defendant, to wit, on the 1st of *February*, 1819, a large quantity of wheat, to wit, two thousand bushels of winter wheat, of the value of two thousand dollars, for the rent aforesaid, for twenty years, became, and were in arrear, and unpaid, &c.; and that the defendant, though often requested, &c., has not kept the said covenant, but has refused, &c.

*The defendant pleaded in bar, that the plaintiff had not, from time to time, or at any time, appointed a place, in the city of *Albany*, for the defendant to pay the rents, &c., to wit, on the first day of *February* in each year, with a verification.

To this plea, there was a general demurrer and joinder.

N. Williams, in support of the demurrer; 1. The plea contains no prayer for judgment which is held to be necessary. (1 *Chitty Pl.* 538, 539. 2 *Chitty Pl.* 422.) This is a defect in substance. (1 *Chitty Pl.* 445. 1 *Tidd Pr.* 597, 598, 599.) Without a prayer for judgment, there is no proper conclusion to the plea. (*Co. Litt.* 383.)

2. Is the plaintiff to lose his rent because he omitted to appoint a place in *Albany* for the delivery of the wheat? The defendant does not say, that he was ready in *Albany* to deliver the wheat; or that he was ready to deliver it at any place whatever.

As no place in *Albany* was appointed, it was the duty of the tenant to seek the landlord, and find out from him where he wished to have the wheat delivered. In other cases of covenant, as to deliver wheat, timber, &c., where no place of delivery is fixed, the obligor is not bound to carry it about, but must go to the obligee, and find where he will have it, and there it must be delivered. (*Co. Litt.* 210. b.) Or, if the defendant was desirous to pay the rent, and to deliver it at *Albany*, he might have deposited it there in store, subject

Where a lessor proceeds for a forfeiture, or to enforce a penalty, he must show a demand of the rent on the very day it was payable. But where the rent is payable on the land, and he brings an action of covenant, or proceeds by distress to recover the rent, he need not show a previous demand, although the rent was payable on demand. And it is a good defence for the tenant that he was ready on

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the land to pay; but that the lessor was not there to receive the rent.

But if the rent is payable at a place off the land, and there is a clause of distress, in case the rent, being lawfully demanded at such place, is in arrear, the lessor cannot distrain without a previous demand of the rent.

In a lease of land in the county of *Oneida*, the rent was reserved in wheat, to be delivered annually, at such place in the city of *Albany*, as the lessor should appoint; *Held*, in an action of covenant for arrears of rent, that it was the duty of the lessor to appoint

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the place in
Albany, and
give notice
thereof to the
lessee; and that,
in default of
such appointment
and notice, the rent
was payable on
the land; and,
therefore, the
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lessee should
plead a tender,
or that he was
ready on the
land to deliver
the wheat, &c.

to the order of the plaintiff, and that would have been a good defence in this action.

3. There being no place appointed off the land, for the payment of the rent, and which is at the option of the landlord, it was payable on the land, and the defendant was bound to aver, and prove a tender of it there. (*Co. Litt.* 210. b. 211. a.) Without showing a tender, or, at least, a readiness to perform, the plea is no bar. It is not necessary for the landlord, unless he means to proceed for a forfeiture, to demand the rent. (4 *Bac. Abr. Rent.* 1.) The party bound, must be ready to perform, and that must be averred and proved. (7 *Johns. Rep.* 24. 5 *Johns. Rep.* 119.)

Again; this may be considered as a privilege and benefit *of the landlord, and, as such, may be waived by him. If waived, it is the same as if nothing had been said in the lease as to the place of delivering the wheat, and it must be delivered on the land.

3. This is not a condition, which must be expressed by apt words. (*Sheph. Touchst.* 160. *Woodfall, Ten.* 316.) If the proviso, or condition, be the words of the lessee, to compel the lessor to do something, it is a covenant, not a condition. At most, this is an independent covenant. It is not a condition precedent. (1 *H. Bl.* 373. 6 *Term Rep.* 573. 8 *Term Rep.* 373. 375. 10 *East Rep.* 295.) The reason of the doctrine on this subject is, that where the defendant has enjoyed a principal part of the consideration for which he entered into the covenant, it would be unjust, because there was a failure in a small part, for which he has an action for damages, that he should be allowed to enjoy what he has received, without paying for it. (1 *Saund.* 320. c. 1 *Chitty Pl.* 314. 7 *Johns. Rep.* 249.) Here, the tenant has enjoyed the premises for twenty years under this lease, and has paid no rent. He has sustained no damage, or inconvenience, from there being no place appointed by the lessor, for the delivery of the wheat. Is the plaintiff to be for ever barred from receiving this rent, because he did not appoint a place for its payment?

Kirkland, contra. If the plea is bad in form, for want of a proper conclusion, the defendant should have demurred specially. But it is unnecessary to examine that objection, for the declaration is bad. This case is to be decided on general principles, rather than by the analogy of particular cases. If we look at the plain intent of the parties, and the good sense of the contract, there can be no difficulty. The lessee had a right to wait until the lessor had designated a place for the delivery of the wheat. He could not perform his covenant without some act previously done on the part of the lessor. The cases cited as to the general rule, in regard to covenants, dependent or independent, are not applicable to the present case. This was, at least, a *quasi* condition precedent, and the

lessor was bound to inform the lessee of the place in *A.* where the rent was to be paid, or *the wheat delivered. Until this precedent act was done by the lessor, there was no *duty* on the part of the lessee, for the non-performance of which the lessor could have an action. (*Ramsay v. Alexander*, *Yelv.* 76. 3 *Salk.* 308, 309, 310.) That the lessor has slept on his rights for twenty years, can be no reason for adopting any new rule of construction in his favor.

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SPENCER, Ch. J., delivered the opinion of the court. There is a distinction running through the books between a proceeding by the lessor, with a view to a forfeiture of the estate of the tenant, or to impose a penalty on him, and a proceeding to recover the rent in an action of covenant, or by distress. In the two former cases, there must be a strict demand of the rent on the very day it is payable. In the latter cases, there need not to be a previous demand, although the rent be payable on demand. But in such case, the rent must be payable on the land; and then it would be a good defence, for the tenant, that he was ready on the land to pay, had the lessor been there to receive it. There is another distinction; if the rent be payable at a place off the land, with a clause, that if the rent be behind, being lawfully demanded at the place off the land, and a distress is given, the lessor cannot distrain without a previous demand. *Bac. Abr. Rent*, (I.)

I am inclined to the opinion, that as the rent was in this case payable at such place in the city of *Albany* as the lessor should, from time to time, appoint, and this being for the benefit of the landlord, and to the prejudice of the tenant, that it became the duty of the landlords, if they would have the rent payable there, to make the appointment, and give notice to the defendant; and in case this appointment was not made and notice given, the consequence would be, that the defendant would be absolved from delivering the wheat in *Albany*; but still he would be bound to deliver it on the land, for rent issuing out of land, where no place is appointed, is payable on the land; (1 *Inst.* 210, 211. *Bac. Abr. Tender*, (C.) and hence, it became necessary for the defendant to plead a tender, or a readiness to deliver the *wheat upon the land. The plea not having stated this, is bad. (a)

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Judgment for the plaintiff, with leave to the defendant to amend, on payment of costs.

(a) Vide *Lush v. Druse*, 4 *Wendell's Rep.* 317.

ALBANY,
January, 1821.

ROBERTSON

v.

LYNCH.

ROBERTSON against LYNCH.

Where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff may, if he fails to prove the special agreement, abandon the special count, and resort to the general count; but this cannot be done, if the goods were, in fact, sold under the special agreement, and the plaintiff might, if he had framed the special count properly, have recovered upon it. (a)

Where the contract stated [* 452] in the declaration is on a past consideration for the delivery of goods, without mentioning the place of delivery, and in the alternative as to the time; and the contract proved, was on an executory consideration, to deliver goods at a particular time and place mentioned, the variance was held fatal, and the verdict was set aside. (b)

It seems, that a clerk, who has sent goods, and

THIS was an action of *assumpsit*, tried at the *Oneida* circuit, in *June* last. The declaration contained two special counts. The first count charged, that the defendant, on the first day of *February*, 1818, in consideration, that the plaintiff had delivered to him, fifteen bags of wool, of the value of 1,070 dollars, and 92 cents, to be manufactured into sattinets, for a certain reward to be paid to him, promised that he would cause the said wool to be manufactured into sattinets for the plaintiff, early in the next spring after the delivery of the said wool, or as soon after as the same could be manufactured by the defendant, or his agents, &c., or when the defendant should be thereto, afterwards, requested, &c. The plaintiff averred, that the sattinets were manufactured by the defendant, and demanded by the plaintiff, who offered to pay the charges for manufacturing them, but the defendant refused, &c. and converted the same to his own use. The second count charged, that the defendant, on the first of *February*, 1818, in consideration that the plaintiff had delivered to the defendant a quantity of wool of the value of 1,070 dollars, and 92 cents, to be manufactured into sattinets, for a certain reward, undertook and promised to manufacture the said wool, and deliver the sattinets to the *plaintiff early the next spring, or when the defendant should be thereto, afterwards, requested, and to render to the plaintiff a reasonable and just account thereof, when requested; but, although, &c. the defendant has not manufactured the wool, but refuses so to do, or to account for the same, &c. The declaration contained, also, the general counts for goods sold and delivered, and the common money counts. The defendant pleaded *non assumpsit*.

At the trial, the plaintiff gave in evidence a letter to him from the defendant, dated the 15th of *November*, 1817, offering to manufacture sattinets at sixty-three cents per yard, if the plaintiff would furnish the wool for that purpose; the wool to be delivered to the defendant in *New-York*, and the sattinets to be delivered to the plaintiff in *New-York*; also, a letter from the defendant to the plaintiff, dated the 7th of *December*, 1817, in which the defendant says, "if you should conclude to send some wool this fall, you may rely on having justice done you, and the goods shall be delivered early in the spring." A clerk of the plaintiff proved, that the plaintiff, in consequence of the defendant's letter of the 15th of *November*, sent him, in *December*, 1817, 2,047 1-4 lbs. of wool of various qualities.

The evidence, as stated in the case, went to show, that the wool was delivered to the defendant pursuant to that special agreement. And the account of the plaintiff's claim exhibited

(a) Vide *Wood v. Edwards*, 19 *Johas. Rep.* 305.
Jewell v. Schroepfel, 4 *Coven's Rep.* *Andrews v. Montgomery*, 19 *Johas. Rep.* 102.
(b) *Porter v. Talcott*, 1 *Cow. Rep.* 359.

to the jury, showed, that he relied on the special contract, as stated in the defendant's letters of the 15th of *November*, and the 7th of *December*, 1817. The principal objection, at the trial, on the part of the defendant, was that the contract proved, *varied* from the contract declared on, and that the plaintiff could not, therefore, recover; but the judge overruled the objection.

The defendant, also, objected to the testimony of the plaintiff's clerk, who was permitted to swear to the exact quantity of wool delivered, and the various qualities of it, by referring to an extract from the plaintiff's day book of entries, made by himself, at the time of delivery. He said, that he perfectly recollected the fact of the delivery of the wool, in consequence of the defendant's letters, and of his making the original entry thereof in the plaintiff's day *book, but that he could not state the precise quantity, nor the different qualities, without refreshing his memory, by referring to a copy of the entries which he had made. The defendant, also, objected to the copy of a letter from the plaintiff to the defendant. The clerk testified, that he had copied the original letter into the plaintiff's letter book, and then put it into the post office, and that the copy then offered was a true copy made by him from the copy in the letter book. The judge allowed the copy to be read in evidence, after notice given to the defendant to produce the original. There was, also, an objection to the allowance of interest. The jury found a verdict for the plaintiff, for 1,128 dollars and 20 cents.

A motion was made to set aside the verdict, and for a new trial.

J. Lynch, the defendant, contended, 1. That the clerk of the plaintiff should not have been allowed to refer to his extract or copy from the plaintiff's day book, to refresh his memory, but that the original book of entries should have been produced. (3 *Term Rep.* 752. 754.)

2. That the copy of a copy of an original letter in the plaintiff's letter book, was not evidence. In *Liebman v. Pooley*, (1 *Starkie's N. P. Rep.* 169.) after notice to produce an original letter, Lord *Ellenborough* said, that parol evidence of its contents might be given, but he decided that the contents would not be proved by a copy of the original copy.

3. There was a material variance between the contract proved, and the contract set forth in the declaration. Where the plaintiff counts on a special contract, he is strictly confined in his proof to the one stated. The only contract shown, is that contained in the letters of the 15th of *November*, and the 7th of *December*, 1817. The contract in the declaration is, that the defendant, in consideration that the plaintiff *had delivered* to him a quantity of wool, &c., promised, &c.

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made the entries in the plaintiff's book, may be allowed to refresh his memory, as to the quantity and quality of the goods, from an extract made by him from the original entries.

It seems, that a copy of a let

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ter which the witness swore was a true copy of the original copy in the plaintiff's letter book, made by him at the time, from the original letter put by him in the post office, is admissible, after notice had been given to the defendant to produce the original letter.

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(*Doug.* 668. 2 *East*, 4. n. 4 *Term Rep.* 560. 8 *East*, 188. 1 *Campb. N. P. Rep.* 175. 8 *Johns. Rep.* 253.)

*4. The judge was incorrect in directing the jury to take the price of sattinets in *New-York*, in the spring of 1818, as a measure of damages, and to add the interest from that time.

Davis and *E. Clark*, contra, 1. In *Doe v. Perkins*, (3 *Term Rep.* 752. 754.) *Buller*, J., mentioned the case of *Farmer v. Taylor*, where the witness who proved the delivery, took it from an account, which he said was a copy from the day book, and the judge decided, that if the witness would swear positively to the delivery, from recollection, and that the paper was only to refresh his memory, he might make use of it. Here the witness swore positively to the delivery; but said that without the aid of the memorandum, he could not testify as to the quantity or quality. In the case of *Jacob v. Lindsay*, (1 *East*, 460.) where a witness, who did not make the entries, testified, that on having the articles called over from the book, the defendant admitted them to be correct, he was allowed, at the trial, to refresh his memory, by referring to the particular items in the book.

2. As to the copy of the letter, this case differs from the one cited from *Starkie's Reports*; here the witness himself made the copy from the original letter.

3. As to the alleged variance between the contract stated in the declaration and the proof. The rule is, that if the plaintiff prove a special agreement, and the work done, but not pursuant to such agreement, he may recover on the *quantum meruit*; for otherwise, he would not be able to recover at all. (*Buller's N. P.* 139.) Here the plaintiff proved the delivery of the wool, and its quantity and price. In *Tuttle v. Mayo*, (7 *Johns. Rep.* 132.) the court say, that if the plaintiff fails altogether in his proof of the special agreement declared on, and the case is such, that supposing there had been no special agreement, he might still recover, the evidence may be applied to support the recovery on the general count. The same principle was fully recognized in *Leningdale v. Livingston*, (10 *Johns. Rep.* 36. 4 *Bos. & Pull.* 351. *Doug.* 651. 5 *Mass. Rep.* 391.) If the counts are all good, and entire damages are assessed, the verdict will be supported. (*Tidd's Pr.* 801, 802.)

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*4. In trover, the jury may allow interest from the time of the conversion. (2 *Johns. Rep.* 280.) If an account is sent by a creditor to his debtor, and he makes no objection to it, interest is allowable, as the demand is thereby liquidated. (*Per Spencer, J. Liotard v. Graves*, 3 *Caines's Rep.* 234.)

Talcot, in reply, said, 1. That where a witness will not swear positively, unless he refers to a written paper, he cannot refer to it. (*Phillips's Ev.* 209.) If, after he has refreshed

his memory, he will not swear positively, his evidence must be rejected. The copy of the original copy of the letter ought not to have been received, for the letter-book containing the first copy, being in the possession of the plaintiff, he ought to have produced it.

2. The variance, in this case, is between a *past* consideration and an executory consideration, which is material; for a past consideration may be traversed, but an executory one cannot. Again; the contract, as set out in the declaration, is in the alternative, and no *place* of delivery was shown. The plaintiff cannot recover for wool sold and delivered, *quantum valebat*, for there is no evidence of what it was worth; nor can he recover for sattinets sold and delivered, for, if he rescinds the contract, it must be rescinded *in toto*.

Per Curiam. On comparing the *special counts* with the contract, as proved, we think that the objection as to *variance* was well founded. The only proof of the terms of the contract is to be found in the letters of the defendant of the 15th of *November*, and 7th of *December*, 1817, in which he offers to manufacture the plaintiff's wool into sattinets, for 63 cents per yard, and to deliver the sattinets to the plaintiff in *New-York*, early the next spring; and it appears that in consequence of those letters, the plaintiff sent the wool to the defendant in *December*, 1817; thereby signifying, that he acceded to the defendant's offer. The question then is, whether the proposed agreement, stated in those letters, corresponds with either of the counts. The special counts both charge, that in consideration that the plaintiff *had delivered* *wool to the defendant, the defendant promised to manufacture it. The contract proved is, that if the *plaintiff would thereafter deliver wool at New-York*, the defendant would manufacture it, &c.

The first count states a contract to manufacture the wool, and to deliver the sattinets to the plaintiff "*early the next spring, or as soon after as the same could be manufactured, or when he, the defendant, should be thereto afterwards requested,*" without specifying *where* they were to be delivered. The contract proved, was to deliver the sattinets to the plaintiff "*early the next spring,*" at the city of *New-York*. The second count also charges, that the defendant engaged to deliver the sattinets to the plaintiff "*early the next spring, or when thereto afterwards requested.*" There appears to be a variance as to the *time* and *place* of delivery of the sattinets; and the counts charge an agreement to manufacture wool which *had been delivered* before any contract was made; and the agreement proved, is to manufacture wool which the plaintiff should *thereafter furnish*. In all these essential particulars, there is a variance, which ought to defeat a recovery on the special counts. The whole case clearly shows, that a special agreement did exist in regard to manufacturing the wool for the

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plaintiff, who was to receive the avails, not in money, but in sattinets, upon paying sixty-three cents per yard. That agreement was partly executed, and had never been waived nor abandoned; and because the plaintiff has made a mistake in declaring according to the *real contract*, there is no reason why he should be permitted to resort to his general counts. The whole evidence entirely contradicts the idea of a general sale of the wool to the defendant. Where there is a count on a special agreement, coupled with a general count for goods sold, the plaintiff may, undoubtedly, abandon his special count, even after he has attempted to prove it, and failed; and may then resort to his general count. But this can only be done where the proof is *adapted* to the general count. It can never be allowed, where the goods were, in truth, delivered under a special agreement, as in this case; and, where the plaintiff might, beyond all question, sustain a proper count on the special agreement. A contrary rule would enable the plaintiff, *in every case, by his mere volition, to convert a special contract into a general *indebitatus assumpsit*. The true measure of damages under the agreement, as proved, would be the value of the sattinets in the spring of 1818, and not the value of the wool when delivered in *December*, 1817.

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This view of the case renders it unnecessary to consider the other questions which arose at the trial. We are inclined to think, however, that none of the other objections are well founded. But, on the ground of *variance*, we are of opinion, that there ought to be a new trial, with costs to abide the event.

New trial granted.

MUMFORD and another *against* FITZHUGH and others.

Where there is a demurrer to the whole declaration containing several counts, one of which is good, the demurrer must fail. (a)

Declaration in case against

THIS was an action on the *case*, for erecting a dam on the *Genesee* river, turning the natural course of the stream, &c., and thereby overflowing the plaintiff's land. The plaintiff declared against *Elisha Johnson, Orson Seymour, Nathaniel Rochester, William Fitzhugh*, and *Charles Carroll*, defendants, the said *E. J., O. S., N. R.* and *W. F.*, being in custody, &c. and the said *Charles Carroll* being returned by the sheriff of *Ontario*, &c., on the *capias ad respondendum, not found*, &c. In the first count, the plaintiffs declared for the injury done to their land, fences, &c., by the overflowing of the water; and, also, by reason of the said flooding and overflowing of the said waters of the said river, &c., a certain public road or highway theretofore running by, and adjoining to the said land of the said plaintiffs, and by which the said plaintiffs had theretofore been accustomed to have access, ingress and regress, to and from the said land, was rendered wholly useless and impassable.

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(a) *Vide Gidney v. Blake*, 11 Johns. Rep. 54. *Martin v. Williams*, 13 *Ibid.* 24. *Whitney v. Crosby*, 3 *Caines's Rep.* 89. *Monnell v. Colden*, 13 Johns. Rep. 395. *The People v. Bartow*, 6 Cow. Rep. 285.

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five defendants,
for turning the
water of a river,
so as to overflow
the plaintiff's
land, and one
of them was not
brought into
court; on special
demurrer, the
declaration was
held bad; but
it would have
been good after
verdict.

Two of the defendants, *W. Fitzhugh*, and *N. Rochester*, demurred to the declaration, and assigned as causes of demurrer, 1. That *Carroll*, one of the defendants against whom *the plaintiffs had declared, had not been brought into court; 2. That the declaration was, in other respects, uncertain, informal, and insufficient, &c.

Cady, in support of the demurrer, contended, 1. That the plaintiff could not declare against the five defendants, unless all of them were brought into court. (*Rose v. Oliver and others*, 2 *Johns. Rep.* 365.)

2. The plaintiff, in addition to the damages claimed for the injury done to his land, cannot claim damages for a public nuisance, by the obstruction of a highway. (1 *Salk.* 112. 115. *Co. Litt.* 56. a. 1 *Esp. N. P. Cases*, 148.) The proper remedy for obstructing a public highway, is by indictment.

Collier, contra. The plaintiff states, in his declaration, that four only of the defendants were taken. The court say, in *Rose v. Oliver and others*, that it was like declaring against *A. B. & Co. simul cum D.* In *tort*, the plaintiff may declare against all, or any of the parties; and the rule applies to actions *quasi ex delicto*, as *case*. (1 *Chitty Pl.* 75.)

As to the second objection, the demurrer is to the whole declaration, and the second count is free from all objection. There is enough, independent of the nuisance alleged, to entitle the plaintiff to recover.

SPENCER, Ch. J., delivered the opinion of the court. The demurrer is to the whole declaration, and if either count be good, the demurrer cannot be sustained. The objection that the plaintiffs sue for a public nuisance, in the obstruction of a highway, is not applicable to the second count, for it does not allege any obstruction of the highway.

On the second ground, however, the demurrer is well taken for *Carroll* is made a defendant, although he has not been brought into court. This would be cured after verdict, as was decided in *Rose v. Oliver and others*; (2 *Johns. Rep.* 367.) but the objection is fatal on special demurrer. The case of *Henly v. Broad*, (1 *Leon.* 41.) is in point, and *it is not overruled by the cases in 1 *Salk.* 32. and 6 *Term Rep.* 766.

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Judgment for the defendants, with leave to the plaintiffs to amend, on payment of costs.

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SMITH.

Joint debtors must be jointly sued. If all of them are not sued, it can only be pleaded in abatement. In a suit against joint debtors, a joint and subsisting indebtedness in all the defendants, must be shown. And in *assumpsit*, it is necessary to show a subsisting liability on the part of all the defendants, except in cases of infancy, death, or discharge of either of them under a bankrupt or insolvent act.

Where, in re-

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spect of any of the defendants, the right of action is gone, or suspended, their joint liability being at an end, the other defendants may avail themselves of this suspension, or discharge, whether it be produced by the act of the party, or by the operation of law, at the instance, and by the agency of the plaintiff.

Thus, where the plaintiff brought an action of *assumpsit* against S. and S., as partners, under the firm of S. and S. & Co., and makers of a promissory note, and recovered a judgment, which was unsatisfied;

ROBERTSON *against* SMITH and others.

THIS was an action of *assumpsit* against the defendants, on two promissory notes, made by "*Soulden, Smith & Co.*" One note was dated the 10th of *July*, 1818, for 1,983 dollars and 83 cents, payable to the plaintiff or bearer, the one half in three, and the remainder in four months from the date. The other note was dated the 19th of *September*, 1817, for 249 dollars and 75 cents, payable twelve months after date, to the plaintiff, or order, at the *Manhattan Branch Bank* in *Utica*. The plaintiff, before the commencement of the present suit, recovered judgment on each of these notes against *Peter Skcn Smith*, and *William Soulden*, the ostensible partners, under the firm of "*Soulden, Smith & Co.*" In his declarations in those suits, he averred them to be partners in trade, and that the notes were made by them in their copartnership name and firm. Not having obtained satisfaction of the judgments; and supposing that *Peter Smith* and *Abraham Van Santvoord* were, also, partners under the said firm, he brought the present suit against the four defendants. *Peter Smith* was the only one arrested on the *capias ad respondendum*, and he appeared, and pleaded specially.

*A case was made, by consent, subject to the opinion of the court, on the following question: Can the plaintiff, notwithstanding the judgments already obtained, maintain this action on the same notes, admitting that all the now defendants were partners in the said firm when the notes were made? If the court should be of opinion, that the plaintiff cannot sustain this action, then a judgment of nonsuit is to be entered against him; but if the court should be of opinion, that the plaintiff can maintain the action, then the defendants shall withdraw the second and third pleas in this cause, and pay the costs of this case; the other costs to abide the event of the suit.

P. A. Jay, for the plaintiff. In *Rice v. Shute*, (5 *Burr Rep.* 2611.) Lord *Mansfield* lays it down, that "all contracts with partners are joint and several; every partner is liable to pay the whole. In what proportion the others should contribute, is a matter merely among themselves." This has been frequently recognized since as the settled doctrine. (*Watson Partn.* 436.) In *Tooker v. Bennet and Brower*, (3 *Caines's Rep.* 4.) *Livingston, J.*, says, "a joint debt is the debt of each, as well as of all the partners." In *Brown v. Belches*, (1 *Wash. Rep.* 9.) the suit in the court below was against *Brown* and *Eaton*, but *Eaton* not being found, the suit, as to him, according to the law of *Virginia*, abated, and the judgment was against *Brown* alone. The objection was raised in the court of appeals, that this being a partnership debt, judgment could

not be entered against one partner only ; but the court decided, that since the case of *Rice v. Shute*, there was no distinction between *torts and contracts*, and that one partner may be sued alone, and if the defendant would take advantage of that circumstance, he must plead it in abatement, and point out the other partners. In *Hamersley v. Lambert and others*, (2 Johns. Ch. Rep. 508.) the chancellor said, that it was, in equity, a joint and several debt, and he held, that where one partner dies, and the survivor becomes insolvent, the creditors of the firm may have recourse to the *assets* of the deceased partner. It is apparent, from the tenor of that case, that a judgment against a surviving partner, without satisfaction, so far from being an **impediment*, would facilitate and strengthen the creditor's claim, as being evidence of due diligence. In *Rice v. Shute*, Lord Mansfield seems to take it for granted, that there may be *several* judgments against partners ; for, he observes, that the old rule of joining all of them, "must have been introduced originally from the semblance of convenience, that there might be *one* judgment against all who were liable to the plaintiff's demand. But, experience shows, that convenience, as well as justice, lies the other way." The act for the amendment of the law, (1 N. R. L. 521. sess. 36. c. 56. s. 13. 2 Rev. Stat. 247. 251. §. 141. 142.) declares, that "all persons jointly indebted, &c. shall be answerable to their creditors separately, for such debts."

If, then, partnership contracts are joint and several, it must be the same, in effect, as if the defendants had said, "we, jointly and severally, promise to pay," &c. ; and then the case of *Ayrey v. Davenport*, (5 Bos. & Pull. 475.) is in point. That action was on a joint and several note, given by the defendant, and one Barber. Judgment, on a *cognovit*, was entered up against Barber, and part of the debt levied on a *fi. fa.* And Mansfield, Ch. J., says, "if an action be brought against Barber, and he suffer a judgment by default or confession, how can that discharge an action against the defendant ? The plaintiff has a right to sue every one of the makers of the note to judgment ; though, it is true, that he cannot have satisfaction more than once. And whether the judgment against Barber were obtained by *cognovit*, or in any other way, can make no difference." In *Thomas v. Rumsey*, (6 Johns. Rep. 26.) which was an action for a libel, the defendant pleaded a judgment obtained against his partner for the same libel and *satisfaction* thereon. The plea, on demurrer, was held good, not on the ground of the prior judgment, but because it would be unjust that the plaintiff should have a *double* satisfaction. The court intimated, that if the plaintiff had not accepted the damages in the first suit, he might have gone on to judgment in the second suit, and then elected *de melioribus damnis*. Even execution of the body, without valuable satisfaction, is no plea in bar, in the case of joint obligors. (*Blumfield's case*, 5 Co. 86.)

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and, afterwards, discovering that P. & V. were, also, partners in the firm at the time the note was given, he brought an action against the four, as makers of the same

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note ; Held, that the judgment recovered against two of the defendants, on the note, was a bar to the subsequent suit against the four defendants, for the same cause of action

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In *Whiteacres v. Hamkinson*, (Cro. *Car. 75.) the defendant pleaded, that one *J. Woodcock* was bound with him, jointly and severally, in the bond, and that the plaintiff recovered against *Woodcock*, and had him in execution on a *ca. sa.*, and the sheriff voluntarily permitted him to escape. On demurrer, the plea was held bad, "for execution, without satisfaction, was no bar." (Cro. Jac. 73. Yelv. 67. 1 Johns. Rep. 291. 3 Mod. 86. 2 Shower, 494. 1 N. R. L. 521.) Had the defendant, *P. S.*, pleaded, that the plaintiff had not only recovered judgment against *S. & S.*, but had also obtained satisfaction, the plea, beyond all question, would have been a good bar. But how can a barren judgment, which does not affect the defendant, or vary his rights, in any degree, have the effect to bar the plaintiff's action? In principle, there is no difference between a bond and a note; yet, in *Sir Anthony Mildmay's case*, (6 Co. Rep. 40.) it is said, that "if two are jointly and severally bound in a bond, and a judgment is given against one, by which it is become of record as to one, but as to the other, it remains a writing as it was before." So, in *Higgen's case*, (6 Co. 45.) it is laid down, that in such a case, "the nature of the bond is not so changed by the recovery, but he may, on the same bond, have an action against the other." In *Drake v. Mitchell and others*, (3 East, 257.) there was a joint covenant for the payment of rent, and the plaintiff took a note, or bill of exchange, of one of the covenantors, in payment of one of the instalments of the rent, on which he brought a suit, and obtained judgment; yet the Court of K. B. held, that this judgment was no bar to an action against all the covenantors, for the very same instalment of rent. In *Watts v. Goodman*, (Lord Raym. 1460.) the action was against one obligor, on a joint bond, and he pleaded the non-joinder of his co-obligor, in bar of the action. The court overruled the plea, without the least intimation that the whole contract would be extinguished by the judgment. Nor is any such intimation to be found in the numerous cases of separate suits on joint contracts.

The whole argument on the part of the defendant, rests on a supposed analogy to the technical rule, that taking the bond of one partner, is an extinguishment of the partnership *contract. A bond is a contract of a higher order, and merges the simple contract; but a judgment is no contract at all, for a contract is founded on mutual assent, but *judicium redditum est in invitum*. (*Bidleson v. Whytel*, 3 Burr, 1545. 1549.) It can never be supposed, that the plaintiff intended, by suing *S. & S.*, the ostensible partners, to discharge the other secret partners. "The most desirable object," says Lord Mansfield, (4 Burr. 2239.) "in all judicial determinations, especially in mercantile ones, (which ought to be determined on actual justice, and not on the niceties of the law) is to do *substantial justice*." This is, undoubtedly, a wise maxim, and furnishes, perhaps, one of the reasons on which the doctrine of extin-

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guishment, as applied to judgments, is founded, that *nemo bis vexari debet pro eadem causa*. But the defendant, *P. S.*, has never been sued before. As regards him, the judgment against *S. & S.* is *res inter alios acta*. It, in no manner whatsoever, affects his person or property. As to the reason of this doctrine of extinguishment, that the time of courts of justice ought not be wasted in the repeated discussion of the same question, between the same parties, it does not apply to this case; for the parties are not the same, and the question is different. But there is a decision on this very point, by the highest judicial authority known in our laws, and which puts the question at rest. In *Sheehy v. Mandeville & Jamesson*, (6 *Cranch's Rep.* 253.) the declaration in the first suit was on a promissory note made and subscribed by the defendant, under the name and firm of *Robert B. Jamesson*. In the suit brought before the Supreme Court of the *United States*, the defendant *Mandeville*, who alone appeared, pleaded a judgment recovered against *Jamesson* on the same note, and insisted, that the contract was thereby extinguished. The plaintiff demurred to the plea. *Ch. J. Marshall*, in delivering the opinion of the court, says, "were it admitted that this judgment bars an action against *R. B. J.*, the inquiry still remains, if *M.* was originally bound, if a suit could originally be maintained against him, is the note, as to him, also merged in the judgment? Had the action, in which the judgment was obtained against *J.*, been brought against the firm, the whole note would, most probably, have *merged in that judgment. But that action was not brought against the firm. It was brought against *R. B. J.* singly, and whatever objections may be made to any subsequent proceedings on the same note, it cannot be correctly said, that it is carried into judgment, as respects *M.* If it were, the judgment ought, in some manner, to bind him, which, most certainly, it does not. The doctrine of merger (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not, afterwards, be maintained against the others, *which is not admitted*) can be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the first suit was on a sole contract. In point of real justice, there can be no reason why an unsatisfied judgment against *J.* should bar a claim upon *M.*: and it appears to the court, that this claim is not barred by any technical rule of law, since the proceedings in the first action were instituted upon the *assumpsit* of *Jamesson* individually."

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Cady and *Talcot*, contra, contended, that the notes were joint only, and that the whole contract was extinguished by the judgment recovered on the notes against two of the defendants jointly. That even admitting the notes to be joint and several, and the former judgment to be founded on the

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several assumpsit of the two who were sued, the contract on the notes was merged in the judgment, and the *joint* remedy on the notes severed and destroyed, by the plaintiff's election and act; and his only remedy, therefore, if any he had, must be on the several assumpsit of each of the other defendants. That the plaintiff, having brought an action against four, as joint debtors, was bound to show a joint contract, upon which all the defendants are now responsible; otherwise, he cannot recover against any of them. That although *P. S.* is the only defendant who has appeared and pleaded, he is entitled to show any thing which destroys the plaintiff's joint and several remedy on the notes, except such matter of defence as may be considered a personal privilege of the other defendants.

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*The contracts of partners are not joint and several, in the sense of the terms, as used by the opening counsel; nor was it in that sense that the terms were intended to be used by Lord *Mansfield* in *Rice v. Shute*, or by J. *Livingston* in *Tooker v. Bennet*. The only question before the court, in *Rice v. Shute*, was, whether, if one of two partners was sued alone, he could, on the trial, nonsuit the plaintiff, by showing that there was another person who ought to have been joined as defendant. It was decided that the defendant could take advantage of the non-joinder of his partner in no other way than by a plea in abatement. That was the only point adjudged. Lord *Mansfield* did not decide, that a note, beginning "we promise to pay," was "we promise, jointly and severally, to pay." He was dissatisfied with the old rule of the common law, which allowed a defendant, sued on a joint and several bond, or note, to take advantage of the non-joinder of his co-obligor, in any stage of the proceedings. When, therefore, he says, that all contracts with partners are joint and several, he means no more than that if one partner was sued, and did not plead the non-joinder of his co-partner in abatement, the contract should be considered so far several, that he should not, on the trial, be permitted to show that the contract was joint, in order to defeat the plaintiff's action. And when his lordship complains of the "many nonsuits, much vexation, and great inconveniences to justice," which the old rule had produced, he does not seem to take it for granted, that there may be several judgments against partners. He does not propose, as a remedy for the evils of the old rule, that the plaintiff may have as many actions as he pleases; but that the first partner sued shall, by a plea in abatement, discover his co-partners, or that the judgment shall be against him for the whole, and he may settle the matter with his partners. One obligor can plead the non-joinder of his co-obligor only when the bond is joint, not when it is joint and several. The same rule applies to a promissory note. If a partner can plead the non-joinder of his co-partner in abatement, as Lord *Mansfield* admitted that he could, it demonstrates, that con

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tracts made by partners are joint only, not joint and several, unless made several, also, in express terms. *Had his lordship been of opinion, that a contract by partners was so completely joint and several, that the plaintiff had a strict legal right, which could not be resisted, to commence, and prosecute to judgment, an action against each partner separately, he certainly would not have decided, that the defendant might plead the non-joinder of his co-partner in abatement. There is no question, that the property and body of each partner is liable for the whole debt; and so they are in all cases of a joint contract. The effect of the judgment is several; but the case of *Rice v. Shute*, as well as every other case in the *English books*, shows that, as to the mode of obtaining judgment, the contract is joint, and not several. If it were otherwise, the defendant could not plead the non-joinder of his co-partner, in abatement. The contract of partners, as to this question, is exactly like any other joint contract. That a contract made by partners does not comprise several and distinct contracts of each partner, in their individual capacities, as well as a joint contract of all, appears from the form of the plea in abatement. The plea is, "that the said supposed promises, if any such were made, were made jointly with one A. B., &c. and not by the defendant alone." Now, if a partnership contract necessarily comprises the several contract of each partner, such a plea would be an absurdity on the face of it. And if the doctrine of the plaintiff's counsel be correct, there never could be a successful plea of abatement of the non-joinder of co-partners.

But, admitting that the contract, on the notes, was joint and several, the plaintiff brought his action on the joint contract, in the first suit. It is laid down by Sergeant *Williams*, (1 *Saund.* 291. note e.) as to a joint and several bond, that "it is at the election of the obligee to consider such a bond either a joint or several one. If he sues one, or each of the obligors, he acts upon it as a several bond. If he sues all of them, he proceeds upon it as a joint bond. If he sues two only of the three, he still proceeds upon it as a joint bond." (*Shep. Touchst.* 363. 376. 1 *Str.* 76. 1 *Show. Rep.* 75.) Here, therefore, the plaintiff, by first suing two of the four partners, has elected to go on the joint contract; and it is the joint contract, and not any several contract, *that is carried into judgment. This, then, distinguishes the present case from that of *Sheehy v. Mandeville* and *Jamesson*, on which the plaintiff so confidently relies, and which, to say the least of it, is not founded upon any former decisions or authorities. The decision in that case was, no doubt, pronounced by the highest tribunal known in our law; and to the opinions of that tribunal, when given upon the construction of the constitution of the *United States*, treaties with foreign nations, or acts of congress, the state courts must bow with respectful submission; but that court possesses no supervisory power over the state courts, for the

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purpose, however desirable, of producing a uniformity of decision throughout the *United States*. So far from this, that court may be called upon to pronounce different opinions upon questions precisely similar, but arising in different states; for the laws of the several states, except in cases within the purview of the constitution, and acts of congress, are to be regarded as rules of decision in trials at common law, in the courts of the *United States*. It is well known, that the common law is not regarded with equal veneration in all the states. In this state, the attachment to the common law is such, that by the constitution of the state, it is made part of the law of the land, subject only to alterations by the legislature. There is no such provision in the constitution of *Virginia*; and there it has been the practice, for half a century, to proceed to judgment against such of the joint debtors as are arrested, without regard to the others. (*Moss v. Moss*, 4 *Hening & Munf. Rep.* 311. *per Fleming, J.*) And the legislature of that state has so far abolished all distinction between joint and several contracts, as to permit the representatives of a joint debtor to be prosecuted in the same manner as if the contract was several. (*Laws of Virginia*, vol. 1. p. 34.) Ch. J. *Marshall*, therefore, who refers to no adjudged case, must have been governed, in forming his opinion, by the law and practice of *Virginia*; and it does not follow, that the law of this state is to be in conformity to that opinion. There is no law or practice here, allowing a plaintiff to sue two joint debtors, and recover judgment against one of them only. The 13th section of the act for the amendment of the law, (1 *N. R.* **L.* 521.) was passed to relieve the creditor from the necessity of proceeding to *outlawry* against such of the joint debtors as could not be arrested. The legislature never intended to give a creditor the right of suing as many persons as he pleased, as joint debtors, and recovering a judgment against one of them. They never intended to change the rule of the common law, which requires a plaintiff to prove a contract, upon which *all* the defendants are responsible, or not recover against any of them. They well knew, that if a plaintiff were allowed to join as many as he pleased, as defendants in the process, and recover against part of them, he might, perhaps, make such as would be important witnesses for those against whom he hoped to recover, parties to the suit, and thereby deprive those defendants of the benefit of their testimony.

Chief Justice *Marshall* says, "had the action in which judgment was obtained against *Jamesson*, been brought against the firm, the whole note would, *most probably*, have merged in the judgment." He could not have meant, that if the suit had been brought against *all the partners, under the firm*, that the judgment would have merged the note, for that is too plain a proposition to admit of any doubt. His meaning, therefore, must have been, that if the suit had been brought against *J.*,
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as a member of the firm, having, as a partner, made the note under that firm, the whole note would have been merged, upon the ground, that it could not then be said, that the first action was brought against J. singly, "and the judgment obtained upon the *assumpsit* of J. individually." In the present case, the suit was brought against *Soulden & Smith*, as partners, and averring, that the notes were made by them, as partners, in the co-partnership name and firm of *Soulden, Smith & Co.* It was brought, therefore, not on the particular *assumpsit* of the two, if the expression may be allowed, distinct from that of the firm, but upon the *assumpsit* of the co-partnership itself; and on the very *assumpsit* upon which the present suit is brought.

But, it is said, this is not like taking a bond of one partner for the partnership debt, which, being a contract of a higher order, merges the simple contract; because, a judgment is no contract at all. Admitting, for the present, that *a judgment is not a contract, still it has the effect of merging a simple contract, as much as a bond, and not only a simple contract, but of merging a bond itself. So that, if *S. & S.* had given their bond for the debt, it would have merged the whole partnership contract; and if the plaintiff had recovered a judgment on the bond, the bond itself would have been merged in the judgment. (*Clement v. Burt*, 3 *Johns. Cases*, 180. 2 *Johns. Rep.* 213.)

In case of the death of one of two joint obligors, his representatives cannot be sued at law; and if the other obligor is insolvent, the obligee must resort to a court of equity, to obtain satisfaction out of the effects of the deceased partner. The same rule applies to a promissory note where it is joint only. (1 *Caines's Cases in Error*, 122.) In *Hamersley v. Lambert*, which has been cited, the chancellor, speaking of a copartnership debt, said, that it was "in equity joint and several;" but had it been joint and several *at law*, that would have been a perfect answer to the plaintiff's bill; and he would have been told, that he had a complete remedy at law.

The 13th section of the act for the amendment of the law, (1 *N. R. L.* 521. sess. 36. ch. 56. 2 *Rev. Stat.* 247. 251. § 141, 142.) which has been cited by the plaintiff's counsel, is copied from the colonial act, (*Van Schaick's ed.* 352.) the preamble to which clearly shows, that the legislature did not consider the contracts of partners joint and several, in the sense contended for by the plaintiff; but that joint partners, as they are there called, are merely *joint debtors*. Notes made by partners are not, necessarily, joint and several. Where a promise, made by several persons, is expressed, "we promise to pay," it is a joint note only. (*Chitty on Bills*, 350.)

The act which has been cited, if at all applicable, is in favor of the defendants. The 14th section provides, that where two or more persons are bound in one bond or recognizance, jointly and severally, or severally only, the obligee may proceed to judgment or execution against all, or any part of them, and if

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the amount is not levied, bring a further action against the residue, or any of them. This section shows, that it was thought necessary, in a case of a joint and several obligation, where the plaintiff had not proceeded *severally, but had obtained judgment against some of the obligors jointly, to provide a remedy against the inconvenience of the common law, and give an action against the *residue* of the joint debtors. At common law, bonds and simple contracts are, in this respect, on the same footing; and as the provision of the statute does not reach simple contracts, the common law, as to them, remains unchanged. But if the statute did apply to simple contracts, it gives no right of action against *all* the joint debtors, but only against the residue, not included in the first judgment. In *Drake v. Mitchell and others*, which has been cited, it seems to be admitted, on the argument, that a judgment against *one* on the covenant, would have been a bar. *Dampier*, in support of the demurrer, said, that "the debt could only be extinguished by following it up to judgment on the covenant out of which it arises; or by taking a remedy for it of a higher nature. The doctrine of extinguishment cannot apply, where a party having two remedies, one upon one instrument, and another upon another, follows only up to judgment; in that case, the other is reserved to him." *Woods, contra*, said, "judgment against one of several covenantors for the same debt, amounts to the extinguishment of the covenant against all." "As to the objection, that the recovery here was had against *one* only, it cannot avail, for this is a *joint* covenant; and, therefore, if there had been a recovery against one only upon it, no doubt it would have been a bar to a recovery against the others." And the court, in that case, held, that the judgment was no bar, because a judgment, without satisfaction, "cannot operate to change any other *collateral and concurrent* remedy which the party may have." But the doctrine for which the defendant contends, is clearly laid down by *Chitty*, (*Chitty's Pl.* 30.) who says, "there is, however, this objection, in the case of a joint contract, to the non-joinder of one or more of the several parties liable, that if a judgment be obtained against one, in a separate action against him on such contract, the plaintiff cannot, afterwards, proceed against the parties omitted, and, consequently, loses their security." But, admitting that the judgment against *S. & S.*, did not work a technical *extinguishment* or *merger* of the notes, as to the other defendants; *and that another action would lie against the defendants not included in the first judgment; still, we contend, that the plaintiff cannot recover a second judgment on the same notes, against the same persons who are defendants in the first judgment; for, though *P. S.* is the only defendant taken, yet the proceedings, under the act, are against all, and judgment must be given against all, in the same manner as if all had been brought into court.

The general rule is, that where a plaintiff brings a joint action
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of assumpsit against several defendants, if one of them is not liable to be sued, the action must fail as to all; (1 *Chitty's Pl.* 31, 32. 5 *Johns. Rep.* 160.) and this, though the person not liable has suffered judgment to pass by default. The exceptions to the rule do not reach this case. If, therefore, the plea shows, that the plaintiff could not recover against *S. & S.*, neither can he recover against the present defendant, *P. S.* It is not necessary, to make this plea available to *P. S.*, that *S. & S.* should have appeared and united in it, especially as they have not been served with process. It is true, that some of the language of *Ch. J. Marshall*, in *Sheehy v. Mandeville*, seems to look that way. But if that case is not distinguishable from the present, and from all others, yet, we suggest, that the rule is, that if a defendant has no defence alone, he can acquire none by joining with another defendant who has a defence. On the contrary, "if two defendants join in a plea which is sufficient for one, but not for the other, it is bad as to both." (1 *Chitty's Pl.* 545.) So far, therefore, from *Mandeville* acquiring a defence, by joining with *Jamesson*, such a union would, if *M.* had no defence alone, destroy the plea as to both. If, therefore, *P. S.* could ever have a defence to this action, he can have it by his sole plea. It certainly cannot be required of him, that he should join with *S. & S.*, on whom no process has been served, and who are not in court.

Again; in the present suit, *P. S.* alone is taken, which distinguishes this case from that of *Sheehy v. Mandeville*.

The plaintiff could not, at common law, proceed, until he had brought in all the defendants, or had outlawed those not brought in. He has proceeded, therefore, under the statute. (1 *N. R. L.* 521. sess. 36. c. 56. s. 13. 2 *Rev. Stat.* 247. 251. § 141, 142.) Now it *appears, that the judgment against *S. & S.* was obtained prior to the commencement of this suit. If, then, that judgment merged the contract as to *S. & S.* only, they thereby ceased to be joint debtors with the other defendants, on that contract, (for no man can be a debtor on a contract which is merged as to him,) and there was no joint obligation or contract upon which a remedy could be had at law against them, had they been taken and brought into court. This case, therefore, does not come within the statute; and the plaintiff not having brought the other parties into court, but having gone on to plea and demurrer without them, cannot sustain the present action, even if it should be admitted that he might recover against *P. S. & A. Van Santvoord*, or *P. S.* alone, had the action been brought against them only.

Chief Justice *Marshall*, (6 *Cranch*, 265.) says, "in point of real justice, there can be no reason why an unsatisfied judgment against *J.* should bar a claim upon *M.*" This might be said in all cases where the creditor has taken a bond from one partner for a partnership debt, whereby the original contract is extinguished; for an unsatisfied judgment is as good as an un-

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satisfied bond. The question as to merger, or extinguishment, arises as soon as the *higher security* is taken or obtained, and is not to be determined by subsequent events or circumstances as to the higher security being satisfied or not. The plaintiff's counsel say, that it would be doing violence to the plain meaning of the transaction, to suppose that the plaintiff intended, by suing S. & S. only, to discharge the other two defendants; but the intentions of a plaintiff can never be allowed to determine the legal effect of a judgment. Every man is bound to know the legal consequences of his own acts. Justice requires nothing which the law does not allow; and the law abhors a multiplicity of actions. (15 *Johns. Rep.* 229. 432.)

It is said that it is inconceivable how a barren judgment which does not affect P. S., or vary his rights, in the least, can have the effect of giving him a good defence in this action. There are many transactions to which a defendant is not a party, which may furnish him with a good defence. Thus, in the case of *Cheetham and others v. Ward*, (1 *Bos. & Pull.* 630.) one of two joint and several obligors, made out a good defence, by showing that his co-obligor had been appointed one of the executors of the obligee. And Ch. J. *Eyre*, in giving his opinion, in that case, says, "in fact, there is but one duty extending to both obligors, and it was pointedly put, that a discharge of one, or a satisfaction by one, is a discharge of both; this puts an end to the argument, that the action is not necessarily suspended as to both, for it is the effect of the suspension as to one, that releases, discharges and *extinguishes* the action as to both." And *Shepherd*, Sergeant, who was counsel for the plaintiff, admitted, that "when the bond is joint, and the debt is extinguished as to one co-obligor, it is extinguished as to both." So, one defendant who suffers a verdict or judgment to be taken by default against him, may be protected by a successful defence made by his co-defendant. (*Bull. N. P.* 84.)

Jay, in reply, 1. As to the objection, that if the plaintiff has any remedy, it is by a suit against P. S. alone, and not jointly with the other defendants, it is merely *formal*, and intended to drive the plaintiff to a new action. The two defendants, against whom the judgment was obtained, were made parties, because, if they had not been made defendants, the non-joinder of them would have been pleaded in abatement; and, because, in *Sheehy v. Mandeville and Jameson*, the same course was pursued and sanctioned by the Supreme Court of the *United States*. The other defendants were not served with process, as they were notoriously insolvent, and because they might have said that they ought not to be *bis vexati pro eadem causa*. If the plaintiff can recover at all, it must be in the present action; otherwise, a plea in abatement, by driving him to this form of action, would be virtually, a plea in bar.

A contract entered into by a plurality of persons, and not

expressed to be either joint or several, is considered a joint, or a several contract, according to circumstances. It is so far joint, that one or more sued upon it, may, on applying in due season, compel the plaintiff to unite the others in the action. It is so far joint, also, that at law, perhaps, *though not in equity, the remedy against one or more of the parties may be lost by death. It is several, when it is sufficient evidence of a several averment in the declaration. It is several, when the assets of a deceased partner are made responsible. It is several, when it is decided, that the release of one under a bankrupt or insolvent law, or by reason of infancy, &c. is no discharge of the other. So, that it appears, that a contract, not expressed to be joint or several, may be joint, in relation to one set of circumstances, and several, in regard to another.

Suppose two partners, one residing in *England*, and the other here, a judgment against the one in *England* cannot bind the separate property of the partner here, nor a judgment here bind the property of the partner in *England*. If, then a judgment against one, is a bar to an action against the other, it will subvert the fundamental principle of the law of partnership, that not only the joint, but the separate property of each partner is liable for the debts of the firm. Again; suppose, on a suit against partners, one only can be found in the state, to be served with process, how is the creditor to obtain any redress against the persons, or separate property of the absentees, unless he is allowed to sue them, whenever they return?

But, it is said, that we must have a judgment against all the defendants, or against none, and then there will be two judgments for the same cause, against two of them. All the plaintiff asks is a judgment, which, in its *form*, may include all the defendants; but in *substance* and effect, *P. S.* only; a judgment on which "it shall not be lawful to issue or execute any execution against the body, or separate property, of any person not brought into court." In that case, the persons and separate property of *S. & S.* would be reached by one judgment; and the person and separate property of *P. S.*, and the joint property of all the defendants, by another judgment. And this is the relief to which the plaintiff is legally entitled. Should it be said, that the joint property of *S. & S.* would then be bound by two judgments for the same debt, it may be answered, that this is no more than what may happen in other cases; as where several judgments are obtained against the makers and endorsers *of a promissory note, all of which are for the same identical debt. But, the first judgment, in truth, affects only the separate property of *S. & S.*, after an account taken of the partnership. (*Matter of Smith*, 16 *Johns. Rep.* 106.) At all events, it does not belong to *P. S.* to make that objection.

The whole argument of the defendants rests on the harsh, technical doctrine of extinguishment; a doctrine like that of

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survivorship, which neither is, nor ought to be, (as Mr. J. Thompson observed,) "viewed in a very favorable aspect either at law or in equity." It savors of the nature of penalty and forfeiture, and ought, therefore, to be construed most strictly. It is not surprising, then, that the defendant's counsel have not been able to adduce a single adjudged case in point, but have been compelled to reason from analogy. Every general rule of law, however absolute in its terms, is to be understood relatively, and is subject to qualification and exception. Suppose the case of a contract made *before* the passing of an insolvent law, and judgment recovered after the law is passed; will it be said, that a discharge under the insolvent law, discharges the judgment; that the judgment extinguished the contract; that although no state can pass a law impairing the obligation of a contract, yet, as a judgment it is not a contract, it does not come within the clause of the constitution of the *United States*? Will it be said, that a contract which has been solemnly declared by a court valid and effectual, recorded on its rolls, and ordered to be enforced, ceases, therefore, to be protected by this constitutional provision? Where a *bond* is given for a simple contract, the parties, by their agreement, substitute the one for the other. That is not the case with a judgment, which is rendered *in invitum*. It is true, after a judgment, and while it remains in force, a new action cannot be maintained for the same identical cause of action; for the courts no longer take notice of the original subject of dispute, but merely enforce the judgment; and, in that sense, the original contract may be said to be extinguished. Still, the contract, and the obligation to discharge it, remain in full force. The record of the judgment does not destroy the contract, but affords the highest and most solemn evidence of it. In the suit against *S. & S.*, the subject of controversy was not whether they were the only partners in the firm, but whether they were partners at all, and made the notes in question. The subject of dispute in the present action is, whether *P. S.* was not, also, a partner when the notes were given; this is the real question which a jury would have to decide. If a judgment necessarily *extinguishes* a contract, why does not a judgment against *executors and administrators* bar an action against heirs and devisees for the same identical debt? Or, why does not a judgment against a surviving partner, bar all remedy against the assets of the deceased partner? A court of equity cannot revive that which the law has extinguished.

The counsel for the defendants, finding themselves strongly pressed by the authority of the case of *Sheehy v. Mandeville and Jamesson*, have exerted all their ingenuity to find out some peculiarity in that case to render it inapplicable. But neither the counsel who argued that cause, nor the chief justice who pronounced the decision, put it on any peculiar grounds either

of fact or local law. *Lee, arguendo*, says, "the cause of action against *J.* only, is merged in the judgment, not the joint cause of action against *M. & J.*" And *Young*, and *C. Lee, contra*, say, "a plaintiff may, if he pleases, sue only one of the copartners, and, if the defendant does not plead in abatement, the action may be maintained."

If *P. S.* is a partner, there can be no question as to the justice of the plaintiff's claim against him, and that he ought, in honesty and conscience, to pay the debt.

SPENCER, Ch. J., delivered the opinion of the court. The first position taken by the plaintiff's counsel is, that where several persons are indebted as partners, they are jointly and severally indebted; and the case of *Rice v. Shute*, (*Burr. Rep.* 2611.) has been cited in support of that doctrine. Lord Mansfield did say, in that case, *that all contracts with partners were joint and several, and every partner was liable to pay the whole*. The statement of that case is, that on the trial, evidence was given that one *Cole*, who was not joined in the action as defendant, was, a partner of *Shute*, and thereupon the plaintiff was nonsuited. This nonsuit was set aside, on the ground, that the fact of there being *another partner ought to have been pleaded in abatement. This was a most salutary decision, and prevented much injustice and costs, by requiring the party defendant to take his stand *in limine*, by pleading in abatement, and showing who the other partners were. But it would be straining Lord Mansfield's opinion unreasonably, to say, that he meant technically, that all contracts with partners were *joint and several*, for, then, the nonjoinder of any of the partners never could be pleaded in abatement, which all the court expressly decided. In equity, they are joint and several; and so they were as regarded that suit; the defendant having neglected to avail himself of the objection in a legal manner. Surely, it cannot be said, that in a legal sense, where there are a plurality of debtors, that their contract is joint and several, when they have engaged jointly to pay the debt. Each debtor is bound for the whole, until the debt is paid: but as regards the remedy to coerce payment, there is a material and settled distinction. If they have undertaken severally to pay, separate suits may be brought against each; but where their undertaking is joint, unless they waive the advantage, by not interposing a plea in abatement, they must be sued jointly, if in full life, and neither has been discharged by operation of a bankrupt or insolvent law, or is not liable on the ground of infancy. We must, then, consider the promises in this case, as joint.

Two questions then arise: 1. Whether, by the plaintiff proceeding to judgment against two of the joint promisors, the debt is not merged in the judgment? 2. Whether, having made the two partners against whom the judgment was

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recovered, parties to this suit, the suit can be sustained against the other defendants, in consequence of the extinguishment of the simple contract debt, as to the two defendants, by the judgment against them?

(1.) In *1 Chitty, 30.*, the law as to the effect of proceeding to judgment against one of several joint debtors, is thus laid down: "There is, however, this objection in the case of a joint contract, to the non-joinder of one or more of the several parties liable; that if judgment be obtained against one, in a separate action against him on such contract, the plaintiff cannot, afterwards, proceed against the parties omitted, and, *consequently, loses their security." By reference to the cases cited by *Chitty*, it will be found, that they were actions in *tort*; and even in those actions which are, in their nature, joint and several, it has been held, that where the plaintiff proceeded to judgment against one, the others might plead this in bar. (*Cro. Jac. 73. Yelv. 67. Com. Dig. Action, K. 4. 6 Co. Rep. 75.*) These cases came under review in this court, in *Livingston v. Bishop*, (*1 Johns. Rep. 291.*) and it was decided, that a judgment alone would be no bar, without satisfaction. In *Wilkes v. Jackson*, (*2 Hen. & Munf. 358. 361.*) it was decided, that a judgment for damages, in a separate action against one of several joint trespassers, is a bar to an action against the rest. There is, however, a wide difference between a judgment against one of several *tort-feasors*, and against one of several joint debtors. In the latter case, whatever extinguishes or merges the debt as to one, merges it as to all.

(2.) But the second point is clearly with the defendants; that in actions *ex contractu*, against several, if a joint contract be not proved against all the defendants, (with the exception of infancy, and a discharge under a bankrupt or insolvent law, and of the death of one of the parties,) the plaintiff must be nonsuited on the trial; and if it appear on the pleadings, that too many persons are made defendants, the defendants may demur, move in arrest of judgment, or sustain a writ of error. (*1 Saund. 153. n. 1. 291. f. g. 2 Str. 820. 1 Bos. & Pul. 73. 6 Term Rep. 770.*) In the case of *Hartness and another v. Thompson and wife and Nelson*, (*5 Johns. Rep. 160.*) the plaintiffs declared against the defendants on a joint and several promissory note. It appeared, on the trial, that *Nelson* was an infant, a verdict was taken for him, and against the other defendants. This was held to be correct, on the ground, that infancy was a personal privilege, to be taken advantage of only by the infant himself. This, however, was, in some measure, a departure from former decisions; and the contrary was determined in *3 Esp. N. P. 76.* and *5 Esp. 47.* We adopted the principle advanced by Mr. Justice *Deniston*, (*1 Wils. 90.*) that in cases where an action is brought against several persons on a joint contract, and one pleads some plea

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which goes to his personal discharge, and not to *the action of the writ, the plaintiff may enter a *nolle prosequi* as to him, and proceed against the others. But Mr. Justice *Van Ness*, in delivering the opinion of the court, in *Hartness v. Thompson and others*, expressly says, "the general principle, that the plaintiff must prove a joint contract when he brings a joint suit, is not intended to be shaken, by the rule which the court have thought proper to apply to this case." "We mean," (he says,) "to confine its operation, exclusively, to the case of a defence insisted upon by one of several joint debtors, which is personal to him, and which does not go to the discharge of all." If, then, in an action against several, upon a joint contract, the plaintiff must show a joint subsisting contract, we are led to the inquiry, whether the judgment against *Soulden* and *Peter Sken Smith*, upon these identical notes, does not form a bar to a recovery in this suit against the four defendants. In *Cheetham and others, Executors, v. Ward*, (1 Bos. & Pul. 630.) the case was, that *William Ward*, and *James Ward* gave a joint and several bond to *Cheetham*; the plea was, that *Cheetham*, the testator, by his last will, appointed *William Ward* one of his executors, who, with the other executors, duly proved the will, and took upon them the execution thereof. There was a demurrer to the plea, and joinder. The court were unanimously of opinion for the defendant; and *Eyre*, Ch. J., put the decision on this acknowledged principle, that where a personal action is once suspended, by the voluntary act of the party entitled to it, it is for ever gone and discharged. This, he said, was admitted to be the case, where there was but one obligor, but that the very point in issue had been decided in the year book, 21 *Edw. IV.* 81. *b.* He said, there was but one duty extending to both obligors, and it was, therefore, pointedly put, that a discharge of one, or a satisfaction made by one, is a discharge of both; and that, he said, put an end to the argument, for it was the effect of the suspension as to one, that released, discharged, and extinguished the action as to both. *Heath*, Justice, said, it was of no consequence whether the release be by operation of law, or by deed demonstrating the intent of the party. *Rooke*, Justice, said, the obligee has it not in his power to elect to discharge one obligor, *without discharging the other. (1 Bos. & Pul. 632. S. C. note *a. Bac. Abr. tit. Obligation, D. and the cases there cited.*) The case of *Drake v. Mitchell and others*. (3 East, 251.) has been much relied on by the plaintiff's counsel as a strong authority in maintenance of this action. The case was, that one of three joint covenantors gave a bill of exchange for part of a debt secured by the covenant, on which bill a judgment was recovered. The plea stated, *that for the payment and satisfaction thereof*, (1117. 2s. 3d. residue,) the bill was given, and that judgment had been recovered thereon. It was decided, that the judgment was no bar to the action on

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the covenant against the three, it not being averred, that the bill was accepted as satisfaction, nor to have produced it, in fact. Lord *Ellenborough* said, he had always understood the principle of *transit in rem judicatam*, related only to the particular cause of action in which the judgment is recovered, operating as a change of remedy, from its being of a higher nature than before. That a judgment recovered in any form of action, is still but a security for the original cause of action, until it be made productive in satisfaction to the party; and, 'herefore, till then, it cannot operate to change any other collateral, concurrent remedy, which the party may have. *Grose*, Justice, considered the bill as a collateral security; and *Le Blanc*, Justice, put his opinion on that ground. Taking what fell from Lord *Ellenborough*, in reference to the subject matter, it has no bearing on this case, where the judgment was upon the joint security, or promise itself.

The 13th and 14th sections of the statute for the amendment of the law, &c. (1 *N. R. L.* 521. 2 *Rev. Stat.* 147. 151. § 141, 142.) have been referred to. The 13th section gives a remedy to a creditor against joint debtors, by authorizing process to be issued against them in the manner then in use; and in case any of them are returned taken, he or they so taken and brought into court, shall answer to the plaintiff, and if judgment pass for the plaintiff, he shall have his judgment and execution against such of them as were brought into court, and against the other joint debtors named in the process, in the same manner as if they had all been taken and brought into court, by virtue of such process; but execution shall not be executed against the body, or lands, or goods, the sole *property of any person not brought into court. The 14th section relates solely to bonds and recognizances, in which persons are bound jointly and severally, or severally only, and provides how they may be sued: and; as regards them, alters the provisions of the common law. The 13th section of the act was intended to obviate the difficulty and delay arising from the necessity of outlawing such of the defendants as it was necessary to make parties, and who could not be arrested on the process; for it was a settled principle of the common law, that if there were several defendants in a joint action, and one of them could not be arrested, the plaintiff must proceed to outlawry against him, before he could go on against the others. (1 *Tidd's Pr.* 125. and the notes.) (a) The provisions of the 13th section of the act referred to, show, conclusively, that this was the sense of the legislature, and to remedy this inconvenience, the statute was passed.

I think, then, that I am authorized in saying, that, in case of joint debtors, they must be jointly sued; that if a less number than the whole he sued, that is matter which can be plead-

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(a) Vide 1 *Dunlap's Pr.* 140.

ed in abatement only ; that it is necessary to show a joint subsisting indebtedness in all the defendants ; and, in cases of *assumpsit*, it is necessary to show a subsisting liability on the part of all the defendants, as promisors, with the exceptions already mentioned ; and that where, as respects any of the defendants, the right of action is gone, or suspended, their joint liability being at an end, the other defendants may avail themselves of this suspension or discharge, whether it be produced by the act of the party, or by operation of law, at the instance and by the act of the creditor. Consider the operation of the contrary principle, as regards this very case. The plaintiff has already a judgment upon these notes against two of the defendants, and may proceed to execution. In the present suit, the same defendants are made parties, and necessarily so, and in this suit, also, if the plaintiff can recover, there must be judgment against them ; so that with regard to two of the defendants, there will be, on the records of this court, two distinct judgments for the same debt. In the *former, the separate property of both the defendants will be liable to be taken and sold on execution, and in the latter, the joint property of all the present defendants. This is certainly an anomaly in the law, and is inconsistent with all my notions of a correct and regular judicial proceeding.

The case of *Sheehy v. Mandeville*, (6 *Cranch*, 253.) has been cited and relied on, as entirely decisive of this case. I regard that case as entitled to high respect, from the elevated character of the judges who compose that court ; but it is not authoritative or binding here. The decision is not one of those in which that court has any paramount or controlling force over the state courts. It is to be respected only as the opinion of learned and distinguished judges ; and, viewing it in that light, notwithstanding the homage I am disposed to pay to that court, I cannot, consistently with my views of the law, yield to its authority or reasoning. The cause came up on error to the District Court, sitting at *Alexandria*. The action was *assumpsit*, brought by *Sheehy* against *Mandeville & Jamesson*, upon a promissory note purporting to be given by *Jamesson* only. The allegation was, that *Mandeville* was a secret partner, and that the note had been given by the defendant, under the style, name, and firm of *Robert B. Jamesson*. The only plea necessary to be noticed, is the one in which the defendant, *Mandeville*, who was alone taken, and who alone pleaded, set up, that the plaintiff had before sued *Jamesson* on the same note, in the Circuit Court of the District of *Columbia*, and that such proceedings were had in that suit, that judgment was rendered thereon in favor of *Sheehy* against *Jamesson*, for the debt, and damages and costs, with averments that the judgment was reversed, and that the note then sued upon, was the same as in the former suit. There was a demurrer and joinder. In the Circuit Court, judgment had been given for the defendant. The

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opinion delivered by Ch. J. *Marshall*, on this point, is, that as the first suit was brought only against *Jamesson*, it could not be correctly said, that the contract is carried into judgment, as respects *Mandeville*; that the doctrine of merger could be applied only to a case in which the original declaration was on a joint covenant, not to a case in which the declaration in the *first suit was on a sole contract, (even admitting that a judgment against one of several joint obligors would terminate the whole obligation, so that a distinct action could not afterwards be maintained against the others, which he did not admit.) He observed, also, "that admitting that a previous judgment against *Jamesson* would be a sufficient bar as to him, had *Jamesson & Mandeville* joined in the same plea, it would have presented an inquiry of some intricacy, how far the benefit of of that bar could be extended to *Mandeville*; but they have not joined in the same plea. They have severed; and as the whole note is not merged in a judgment obtained against *Jamesson*, on his individual *assumpsit*, the court is not of opinion, that *Mandeville* has so pleaded this matter as to bar the action." This is the substance of the opinion, and although it comes recommended to us by the abstract justice of the principles advanced, I certainly have not been so fortunate in my researches, as to find the adjudged cases in support of it. It is, undoubtedly, true, that a suit and judgment against *Jamesson* was not a judgment against *Mandeville*; but that the doctrine of merger, or extinguishment, would be applicable only to a case in which the declaration was on a joint covenant, and not to a case in which the declaration in the first suit was on a sole contract, I must beg leave to deny, not in the terms in which the proposition is stated, but upon the facts of that case, and of the one now under consideration. In both cases, the declaration was upon a joint promise; and in the one case, a judgment had been rendered against one of the two defendants, on the same joint contract, and in the other, against two of them on the same promises. Now, if the general issue had been pleaded, and under that evidence could have been given of the recovery of the judgments against some of the defendants, I beg to know, whether, as regarded such defendants, the promises were not merged in the judgments. It seems to me, that this is an undeniable proposition; else, there may be several judgments against the same person for one and the same debt or duty. If, then, as respects the defendants, against whom the judgment had been recovered, the simple contract was merged in the judgment, and they had ceased to be answerable upon the simple contract, the *plaintiff must fail, because he has not maintained his declaration in showing a subsisting indebtedness in all the defendants, in the manner alleged in his declaration; but, on the contrary, it would appear, that the plaintiff, by his own act, through the instrumentality of the law, has suspended

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his remedy against some of the defendants, by changing their indebtedness from that of a simple contract to a debt of record. Nor do I perceive how the court could disengage themselves from the intricacy of the inquiry, which it was admitted would have arisen, had *Jamesson & Mandeville* joined in the plea, (which, in that case, it seems to be admitted, would have been a bar in favor of *Jamesson*,) because *Mandeville* alone pleaded. If a judgment rendered against one of several joint promisors, extinguished, merged, or suspended the plaintiff's right on that contract against one, and, as a consequence, against the other, then, certainly, either of them could plead that matter; and how the legal state of the question could be varied, by the same matter being pleaded jointly or severally, I am at a loss to discover. Upon the whole, I am not satisfied by the train of reasoning adopted in the case of *Sheehy v. Mandeville*. My conclusion is, that the judgment against two of the defendants is a bar to a suit brought on the same cause of action against those two and *Peter Smith* and *Van Santvoord*, as long as that judgment remains in full force. Whether the court would not allow the plaintiff to move to vacate the judgment, is a different question.

Judgment for the defendant.

*The *UTICA BANK* against *VAN GIESON* and others. [* 485]

THIS was an action of *assumpsit*, for money had and received, &c. tried at the *Oneida* circuit, in *September* last, before Mr. Justice *Yates*.

G. Stephens, one of the defendants, left with the plaintiffs for collection, a promissory note of *Hart & Allen*, of *Geneva*, for 264 dollars and 36 cents, payable to the defendants or order, at the *Bank of Geneva*, and which fell due the 11th of *November* last. The defendants were the only endorsers; and *S.*, wishing the note not to be protested, in case it was not paid, wrote, at the bottom of the note, "not to be protested, if not paid, when due." The plaintiffs, not having made any memorandum of this direction of *S.*, and not having received any notice of a protest, presumed that it had been regularly paid at the *Bank of Geneva*, where they had sent it for that purpose; and, on the 20th of *November*, transmitted to the defendants, in *New-York*, a draft on the *Mechanics' Bank* in that city, for 260 dollars and 40 cents, deducting 1 1-2 per cent. for collecting the note; and which draft was paid to the defendants. Soon after, the note was returned to the plaintiffs by the *Geneva Bank*, unpaid; and the plaintiffs produced the note at the trial, and offered to deliver it up to the defendants.

Where money is paid by the plaintiff to the defendant, by mistake, notice of the mistake, and demand of repayment, before bringing a suit to recover it back, are not necessary. For the party receiving money, paid under a mistake of facts, is not a bailee or trustee, nor does his duty to return it, arise upon request.

If notice and demand were necessary, putting a letter containing such notice and demand, directed to the defendant, into the post office, is sufficient.

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The defendants insisted, that the plaintiffs were not entitled to recover, without showing that they had, previous to the commencement of the suit, explained the mistake to the defendants, demanded a repayment of the money, and returned to them the note. That, in regard to the money received, the defendants, if liable at all, could only be considered in the light of trustees, and no fault could be imputed to them, until after notice of the mistake, and a demand of the money. The plaintiffs, then, proved, that after the note was returned to them by the *Geneva Bank*, and before the last of the month of *November*, they put a letter into the post office at *Utica*, directed to the defendants at *New-York*, informing them of the mistake, and requesting a repayment *of the money. There was no proof that this letter, or any notice of the mistake, had ever been received by the defendants, previous to the suit.

Under the direction of the judge, the jury found a verdict for the plaintiffs, subject to the opinion of the court, on a case to be made by the defendants, if they thought proper to move to set aside the verdict.

The cause was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court.

The objection taken to the plaintiff's recovery is, that the defendants ought to have had notice that *Hart & Allen's* note, payable at the *Bank of Geneva*, had not been paid, before this suit was instituted against them; and if so, then that notice through the post office was not sufficient. It is not pretended that the plaintiffs were guilty of any neglect in relation to that note; and the amount claimed was paid to the defendants, upon the supposition that *Hart & Allen's* note had been paid at the *Bank of Geneva*; but it turns out that it was not paid. The plaintiff's ground of action, then, is, that the money was paid to the defendants under a mistake of facts. The defendants are not bailees or trustees of the money thus received. It was paid and received, as their money, and not as money to be kept for the plaintiffs. In such a case, it was not necessary to make a demand prior to the suit; for a request was not essential to the maintenance of the action; nor did the defendants' duty to return the money erroneously paid, arise upon request.

But we are of opinion, that, were it necessary to prove notice to the defendants of the non-payment of *Hart & Allen's* note, and, therefore, of the mistake which had happened, the proof was sufficient. In mercantile transactions, sending notice by the post, is sufficient notice to the party, on the principle of general convenience. It is every day's practice, as to the dishonor of a note, with a view of charging the endorser; and there is no reason why the same practice should not be admitted.

ted as to other mercantile business. (*Phillips's Ev.* 391. 339. 3 *Campb. N. P. Rep.* 379. 4 *Campb. N. P. Rep.* 193.)

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Judgment for the plaintiffs.

*JACKSON, *ex dem.* BARCLAY and BAYARD, against S. HOPKINS. [* 487]

THIS was an action of ejectment for part of lot No. 79, in *Virgil*, tried at the last *Cortlandt* circuit, before Mr. Chief Justice *Spencer*.

At the trial, the plaintiff gave in evidence a mortgage executed by the defendant, to *Barclay*, one of the lessors, dated the 20th of *February*, 1815, given to secure the payment of a bond, the time of payment of which had elapsed before the commencement of the suit. The defendant was in possession of the premises. The plaintiff, also, gave in evidence an assignment of this mortgage from *Barclay* to *Bayard*, the other lessor, dated the 23d of *May*, 1817, and which had been duly recorded.

The defendant rested his defence on the payment and satisfaction of the mortgage; and to prove which, he offered in evidence a power of attorney from *Barclay* to *David Cole*, dated the 18th of *November*, 1815, authorizing him to demand and recover, among others, the debt due to *Barclay* from the defendant, and to release and discharge the same. There was a subscribing witness to the execution of the power, which was acknowledged by the party before one of the judges of the Court of C. P. of *Cortlandt* county, who had endorsed on it a certificate of such acknowledgment.

The plaintiff's counsel objected to the reading of the power of attorney in evidence, unless it was proved by the subscribing witness; and the chief justice decided that it must be so proved, before it could be received.

The defendant then offered in evidence a certificate duly proved, dated the 10th of *April*, 1817, made by *David Cole*, as attorney of *Barclay*, authorizing satisfaction of the said mortgage to be entered of record. This evidence was objected to, unless the power under which *D. C.* acted, was first proved, and, it was, accordingly, rejected.

The defendant's counsel then moved for a nonsuit, on the *ground, that the defendant was entitled to a previous notice to quit, and a verdict was taken for the plaintiff, subject to the opinion of the court on that point.

The case was submitted to the court without argument.

SPENCER, Ch. J., delivered the opinion of the court. The

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A power of attorney to demand and receive a debt, secured by a mortgage, and to execute a release and discharge thereof, &c. is not within the act concerning deeds, (1 N. R. L. 369. sess. 36. ch. 97. 1 Rev. Stat. 756.) and, therefore, not entitled to be read in evidence on the certificate of acknowledgment, or proof thereof before a judge, but must be proved by the subscribing witness, or other evidence of its execution. (a)

A mortgagor in possession is entitled to notice to quit, before an action of ejectment is brought; but if the mortgagor sells the premises absolutely, the purchaser from him is not entitled to notice to quit.

An assignment of the mortgage, by the mortgagee, does not de-

[* 487] destroy the privy of estate, or

(a) Vide *Jackson, ex dem. Tm Esch. v. Richards*, 6 Cow. Rep. 617

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change the condition of the mortgagor's tenancy.

Offering to show that the mortgage had been paid and satisfied, is not a waiver of notice to quit. (a)

(a) *Jackson, ex dem. Beach v. Stafford, 9 Cow. Rep. 547. Jackson v. Miller, 7 Ibid. 747.*

power of attorney from *Barclay to Cole*, does not come within the provisions of the statute. (1 N. R. L. 369. 1 Rev. Stat. 756.) It is not a deed, conveyance, or writing of, or concerning any lands, tenements, or real estate, and, therefore, was not entitled to be read on the acknowledgment of the party; and that was the only proof of its execution. Was the defendant entitled to notice to quit, prior to the commencement of the suit? We think, that he was entitled to notice. It has repeatedly been decided in this court, that as between the mortgagor and the mortgagee, the former is to be regarded as a tenant at will by implication, and is entitled to notice, by which is meant six months' notice to quit. Where a mortgage is given to secure a debt, and the mortgagor is left in possession, we have considered that there existed a tacit and implied agreement, that the mortgagor should continue to hold possession. His possession then, being a lawful one, he cannot, and ought not to be treated as a trespasser, and subjected, at once, to an ejectment. But where the mortgagor sells the mortgaged premises absolutely, the purchaser from him is not entitled to this notice, because the sale itself is an act of disloyalty.

There must, undoubtedly, be a privity of contract or estate, between the lessor and the tenant, to require notice to quit, and here such privity existed. The mere act of the mortgagee, in assigning the mortgage, did not alter the condition of the defendant's tenancy. The objection to the want of notice was not waived by an attempt to show that the mortgage was paid.

Judgment of nonsuit(a).

(a) Vide 2 *Johns. Rep.* 75. 3 *Johns. Rep.* 417. 4 *Johns. Rep.* 186. 215.

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A new trial will not be granted, on the ground of newly discovered evidence, if it appear that the evidence might, with reasonable attention and diligence, have been procured before the first trial. (b)

It seems, that

MOTION, on behalf of the defendant, for a new trial, on the ground of newly discovered evidence. The affidavits on both sides were submitted to the court without argument.

WOODWORTH, J., delivered the opinion of the court. The defendant makes oath, *that since the trial, and not before*, he has discovered that *Stephen Tappen* was a material witness for him on the trial of this cause.

The question submitted to the jury was whether a certain note of about 200 dollars, in favor of the defendant, against *Rayner & Pinney*, and which the defendant had sold to the plaintiff, was, or was not, included in the endorsement of 293

(b) Vide *Fandorcourt v. Smith, 2 Caesar's Rep. 755. Palmer v. Mulligan, 3 Caesar's Rep. 307. Ibid. 189. Talcott, 1 Cow. Rep. 381. Whitebeck v. Whitebeck, 9 Ibid. 276.*

(15 *Johns. Rep.* 293. *Jackson v. Malin.*) *Porter v. Guyott v. Buitt, 4 Wendell's Rep. 578.*

dollars and 50 cents, on the note, upon which the present suit was commenced. The jury believing it was included, gave a verdict for the plaintiff for the whole amount claimed, deducting the endorsement on the note *only*. The affidavit of *Stephen Tappen*, the witness, states, that the note of 200 dollars against *Rayner & Pinney*, was *not the consideration of, nor was it included* in, the endorsement of 293 dollars and 50 cents. The testimony, then, if true, is material; and the further inquiry is, whether *laches* is not imputable to the defendant? If he knew that *Tappen* was a material witness, and that he could not procure his attendance in time, he ought to have applied to postpone the trial. (2 *Caines*, 155. 3 *Caines*, 182. 186. 307.)

It appears, from the affidavit of *William H. Sabin*, that the endorsement is in the hand-writing of *Tappen*; that for five or six years last past, he has been in the service of the defendant, and resided near him at the time of trial; that *Harvey Baldwin*, a son of the defendant, who served the notice of motion for a new trial, and who stated, that he was agent for his father, and took upon him the defence of the suit, admitted that he had seen the note, and knew that the *endorsement was in the hand-writing of *Tappen*. These facts seems to establish great inattention in not procuring the testimony of the witness, or in not putting off the trial of the cause; they excite strong suspicion, that the defence is colorable only. The plaintiff has proved, by a number of witnesses, that *Tappen* is wholly unworthy of credit under oath. This it was competent for him to do. In *Pomeroy v. The Columbian Ins. Co.* (2 *Caines*, 260.) the plaintiff was permitted to read affidavits to question the credibility of the witness newly discovered.

On the whole, I am of opinion, that there has not been proper diligence to obtain the testimony of *Tappen*, and there are strong grounds to believe his character is infamous.

The motion for a new trial must, therefore, be denied.

Motion denied.

DAVIS against TYLER.

THIS was an action of *replevin*, originally commenced in the Court of Common Pleas of *St. Lawrence* county, and removed to this court by *certiorari*. The plaintiff, *D.*, declared, in the usual form, against the defendant, *T.*, for taking the plaintiff's cattle, on his farm, at *Messina*, &c. The defendant avowed the taking as a distress for rent due to him from the plaintiff, as tenant of the premises, under a lease for years, the landlord being seised in fee, &c. The plaintiff pleaded to the *avowry*, that the place in which, &c. was not the close and freehold of the defendant, as alleged in the *avowry*. The

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on a motion for a new trial, on the ground of newly discovered evidence, it is competent to the adverse party to show, by affidavit, that the witness whose testimony is stated to be material, and newly discovered, is wholly unworthy of credit.

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An instrument not under seal, cannot be pleaded by way of *estoppel*.

The form of pleading an *estoppel*, is to rely on the deed, as an *estoppel*, and pray judgment that the party be *estopped*, or not admitted to deny the facts

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in the deed; not

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to demand judgment, *si actio*,
&c.

No venue is
necessary to a
plea; nor to a
demise in an
avowry for a
distress, &c. in
an action of
replevin.

defendant replied, by way of *estoppel*, that the plaintiff had accepted from the defendant a *written* lease for the premises, signed by both parties, and that the plaintiff held and occupied the premises, under that lease, and prayed judgment whether the plaintiff ought to be allowed to question the title of the defendant, &c.

*To this replication the plaintiff demurred, and the defendant joined in demurrer.

Talcot, in support of the demurrer, 1. The replication to the plea to the avowry, is not good as an *estoppel*. The avowant ought to allege the estate of which he is seised. (10 *Johns. Rep.* 424. 1 *Johns. Rep.* 80. 2 *Saund.* 206. *a. n.* 22.)

The facts alleged in the replication, are not sufficient to estop the plaintiff from traversing the avowant's title. By executing an indenture of lease, a party may be estopped from denying, that the lessor could make the demise; it does not acknowledge that the avowant is seised in fee; and if it did, it would not follow that he was so seised in fee, a year after, when the distress was made.

Again; the instrument is not under seal, and, therefore, not sufficient, by way of *estoppel*.

Though the utmost degree of certainty is not required in all cases, so as to preclude all argument, inference, or presumption against the party pleading, yet, in *estoppels*, and in pleas not favored in law, this degree of certainty is required. (1 *Chitty's Pl.* 238. 2 *H. Bl.* 530. *Doug.* 159. 8 *Term Rep.* 167.)

Again; it is not alleged that *D.* made the indenture, or delivered it, which is essential to its perfect execution. An averment that he signed it, does not necessarily imply a delivery. (7 *Term Rep.* 596.)

2. There is no venue to the demise, either in the avowry, or the replication. (1 *Chitty's Pl.* 284, 285.)

Vining, contra, 1. The objection of the want of a venue is a formal one, and should have been taken advantage of on a special demurrer. By pleading over, the party waives it, and the omission is to be considered as cured. (1 *Chitty's Pl.* 284.) But, in truth, no venue is necessary in avowry or *estoppel*. (6 *Johns. Rep.* 26. 2 *Caines's Rep.* 398, 399.)

2. The bar to the avowry is not sufficient. The avowant alleges a precise estate, a seisin in fee. The defendant should have expressly traversed that title. Sergeant *Williams* (1 *Saund.* 347. *d.* note 6.) says, this is an anomalous *case, and contrary to the common rule of pleading to say, "his soil and freehold," generally; for it applies as well to an entail, or for life, as to an estate in fee. The traverse is too broad. (1 *Saund.* 263. *n.* 1.) This is a stronger case than that of an
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ordinary plea. (2 Salk. 562. 3 Caines, 160. 5 Johns. Rep. 112. 10 Johns. Rep. 369.)

3. There may be an estoppel *in pais*. (Co. Litt. 352. a. Comyns's Dig. Estoppel, A. 1. A. 3.) We do not say, that the plaintiff is estopped by deed, but by his acceptance of a lease from the defendant, as a good demise of the premises.

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Per Curiam. No instrument in writing, not under seal, can be pleaded as an *estoppel*. The defendant, therefore, ought not to have replied this unsealed lease, by way of *estoppel*, but should have taken issue upon the fact, that the premises were his freehold. If one gives an acquittance under his hand and seal, for rent, he shall be *estopped* to demand rent due at a day before. But, if the acquittance is not under seal, it is not an *estoppel*, but *evidence* merely. (5 Bac. Abr. 432. Comb. 59.) The form of pleading an *estoppel*, is to rely on the deed as an *estoppel*, and pray judgment that the party be *estopped*, or not admitted to deny the facts which the deed purports, without demanding judgment, *si actio*, &c. (Rawlin's case, 4 Co. 53.)

The objection as to a want of *venue* of the demise, is repelled by the fact, that the plaintiff answered over to the merits, before he demurred; the want of *venue*, in the *avowry*, was thereby waived. In *Thomas v. Rumsey*, (6 Johns. Rep. 26.) it was held, that a *venue* was not necessary in a plea. The *venue* laid in the declaration, draws to it the trial of every thing that is transitory. Nothing could be more transitory than the making of the lease. This ground of demurrer, therefore, is not maintainable; but the first objection is fatal to the replication.

There must be judgment for the plaintiff, on the demurrer, with leave to the defendant to amend.

Judgment for the plaintiff.

*BANK OF NIAGARA *against* M'CRACKEN.

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THIS was an action of *assumpsit*, on a promissory note made by the defendant, dated the 30th of *September*, 1818, for 1,000 dollars, payable to *Lyman D. Prindle* or order, ninety days after date, at the *Bank of Niagara*, endorsed by *Prindle* to *E. B. Allen*, and by him to the plaintiffs. The suit was originally commenced in the Court of C. P. of *Genesee* county, on the 20th of *April*, 1819, and being noticed for trial at the *September* term following, in that court, was removed by the defendant, by *habeas corpus*, into this court.

The defendant pleaded *non assumpsit*, with notice of a *set-off*.

Where a cause is removed from a court of C. P., into this court, by *habeas corpus*, the suit here is not considered as a continuation of the suit below, unless in certain cases, for the purposes of justice.

The plaintiff, may, therefore,

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declare for a new cause of action, and the defendant may set off a demand against the plaintiff, arising since the commencement of the suit below, and before its removal here.

The assignee of a debt takes it subject to all the equity existing, at the time, between the debtor and the assignor. (a)

A previous demand of payment of a bank note, not being [* 494]

payable at any particular place, is not requisite before a suit brought thereon, or to entitle the holder to set it off against the bank.

(a) Vide *Chamberlain v. Day*, 3 Cow. Rep. 353. *Hawley v. Cramer*, 4 *Ibid* 117.

The cause was tried at the *Genesee* circuit, in *June* last, before Mr. Justice *Van Ness*. At the trial, the plaintiffs admitted payments to the amount of 153 dollars. The defendant proved, that on the 28th of *June*, 1819, he was the owner and holder of the bills of the plaintiffs, to the amount of 419 dollars, and on that day delivered them to C., the witness, to pay to the plaintiffs. That C. who had kept the bills in his possession, on the 20th of *July*, 1819, offered them to the plaintiffs, in part payment of the note, but the plaintiffs refused to receive them. The witness produced the bills in court, which he declared to be the same which he had received of the defendant, and tendered to the plaintiffs, and which were in the usual form of bank bills, and not payable at any particular place.

The plaintiffs proved, that on the 10th of *July*, 1819, they assigned 630 dollars, part of the money due on the said note, to *S. Mather*, and on the 24th of *July*, the residue thereof, or 253 dollars and 96 cents, to *M. Searles*, on account of debts due and owing by the plaintiffs to them, respectively; and that notice of the first assignment was given to the defendant, on the 15th of *July*, 1819.

The plaintiffs objected to the set-off, 1. On the ground, that the suit was commenced before the defendant became *the owner or holder of the bills of the plaintiffs; 2. On the ground, that the demand had been assigned before the bills were offered to the plaintiffs in payment; and, 3. Because payment of the bills had never been demanded at the *Bank of Niagara*.

The defendant proved, that the plaintiffs, on the 28th of *June*, 1819, and for some time previous, had stopped payment, and were reputed to be insolvent.

A verdict was found for the plaintiffs, for 983 dollars and 72 cents, subject to the opinion of the court, as to the right of the defendant to have the 419 dollars, or any part thereof, allowed, and set off against that amount.

Gold, for the plaintiffs.

Cady, contra. He cited *Vosburgh v. Rogers*, (8 *Johns. Rep.* 91.) and *Platt v. Platt*, (*Col. Cases*, 36.) decided in *April* term, 1795.

WOODWORTH, J., delivered the opinion of the court. One question to be decided is, whether the defendant can avail himself of matter, by way of set-off, arising after the commencement of the suit in the court below, and prior to its removal to this court. The set-off relied on, goes to the merits of the plaintiffs' demand.

When a cause is removed by *habeas corpus*, the suit in this court is not a continuation of the suit below; and, therefore, as a general rule, the plaintiff may recover for a debt due

before the commencement of the suit here, and the defendant may rely on new grounds of defence; but the court will, in some cases, notice the suit below so as to protect the plaintiff against manifest injustice, if the defence does not go to the merits.

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As exceptions to the general rule, it is said, "that the pleas of the statute of limitation and of coverture are, perhaps, the only ones which the plaintiff has been permitted to defeat, by replying the suit below." This doctrine is fully settled in *Vosburgh v. Rogers*, (8 Johns. Rep. 91.) (a) The defence then is, that on the 28th of June, 1819, the defendant *was the owner and holder of bank bills of the *Niagara Bank*, to the amount of 419 dollars, at which time the plaintiffs were the holders of the note in question. The bills have been kept by the defendant ever since, and were produced in court at the trial. They were not payable at any particular place, and would have sustained an action, without a demand at the bank. I cannot, therefore, perceive any well founded objection to the set-off of these bills against the plaintiffs' demands; they are equally available to the defendant, as if he had been sued by an individual, against whom he held promissory notes, due at the time the action was commenced. On the 20th of July, 1819, the bills were offered at the bank, as part payment, and refused; and, although the plaintiffs had, on the 10th of July, assigned to *Silvester Mather*, 630 dollars, part of the money due on the note, (of which assignment the defendant had notice on the 15th of July,) that will not aid the plaintiffs; for the rights of these parties cannot be varied, so as to deprive the defendant of the defence that existed on the 28th of June preceding. If a valid assignment was made, *Mather* must have taken it, subject to all the equity existing at that time, between the plaintiffs and the defendant. (*Tindal v. Brown*, 1 Term Rep. 167. *Freeman v. Haskin*, 2 Caines, 368.) The residue of the note was assigned on the 24th of July, after the defendant had offered the bills in payment, and that rests on the same ground as the assignment to *Mather*.

We are of opinion, that the sum of 419 dollars, with interest, from the 20th of July, 1819, be deducted from the verdict.

Judgment for the plaintiff, accordingly.

(a) Vide 1 Dunl. Pr. 227, 223: *Bennet v. Rathburn*, 17 Johns. Rep. 37.

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*VISSCHER against GANSEVOORT, Sheriff.

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THIS was an action against the defendant, as sheriff of the county of *Albany*, for the escape of *Thomas Mounsey*, a

An action against the sheriff, for the escape

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of a prisoner in execution from the liberties of the gaol, is not well commenced by handing a writ to a person, with directions to go and see the prisoner off the limits, and then to deliver the writ to the coroner.

The writ must be either actually delivered to the coroner, or left at his office, or be issued and sent to him, with the absolute, positive, and unequivocal intention to commence the suit, while the prisoner is off the limits.

To support the action for an escape, the fact of the prisoner being off the limits of the liberties of the gaol, must be affirmatively and satisfactorily

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shown, by direct and positive proof. Nothing will be intended or inferred.

prisoner, in execution, from the liberties of the gaol, tried at the Albany circuit, in April, 1820, before Mr. Justice Woodworth. It was proved, that on the 26th of June, 1819, the attorney of the plaintiff, hearing that *M.* was off the limits of the gaol, delivered a writ against the defendant, to the witness, *Ackerman*, with instructions "to go and see *M.* off the gaol liberties, so that he could swear to the fact, and then deliver the writ to the coroner." The evidence given as to the fact of *M.*'s being off the limits, at the time the writ was delivered to the coroner, was not perfectly clear.

F. C. White, for the plaintiff. He cited 1 *Caines's Rep.* 70. 2 *Johns. Rep.* 342. 3 *Johns. Rep.* 43. 15 *Johns. Rep.* 326. 17 *Johns. Rep.* 63. *Burdick v. Green*, (*ante*, 14.)

Foot, contra.

Per Curiam. The only question in this case is, whether the suit was commenced when *Mounsey*, for whose escape the defendant is sued, was off the gaol limits.

It was decided, in *Burdick v. Green*, that if a writ was actually made out, and sent to the sheriff, or his deputy, by mail or otherwise, with a *bona fide* and *absolute intention* of having it served, it would be a good commencement of the suit; but, we held, that such intention must be positive and unequivocal. Here the writ was made out, and delivered to a messenger, as we construe the facts, conditionally; that is, he was directed to go and see *Mounsey* off the limits, and then deliver the writ to the coroner; but, if he went, and did not see him off the limits, or if he saw him on the limits, then, it is implied, that he was not to deliver the writ to the coroner. When, therefore, the attorney issued the writ, the intention to commence the suit was not absolute, positive, and unequivocal; and we cannot admit, that the messenger or bearer of the writ shall have it in his power to decide whether the suit shall be commenced, by any event subsequent to the delivery of the writ to him, short of its being actually put into the hands or left at the office of the coroner.

The evidence is not very satisfactory whether *Mounsey* was on the limits, or not, when the writ was, in point of fact, received by the coroner. We rather infer, that he was then on the limits; but the plaintiff should have shown, affirmatively, that he was then off the limits. For, in such an action, we cannot intend, or infer anything, unless it be plain and irresistible, to charge the sheriff. (*a*)

Judgment for the defendant.

(a) *Ross v. Luther*, 4 *Cowen's Rep.* 161. *Ante*, page 20.

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January, 1821WILLARD *against* FOX.WILLARD
v.
FOX.IN ERROR, on *certiorari*, to a justice's court.

Fox declared against *Willard*, before the justice, on an account. The defendant pleaded the general issue, and stated, that he should, on the trial, set off an account and judgment. At the trial, the defendant admitted, that there was due to the plaintiff, five dollars and ninety cents, on the balance of their accounts; and then offered, as a set-off, a judgment in his favor against the plaintiff, for 16 dollars and 54 cents. The plaintiff objected to the set-off, on the ground, that the judgment had been removed into the Supreme Court by *certiorari*. The defendant proved the judgment, by the justice before whom it was obtained, who, also, testified, that he had been served with a writ of *certiorari*, to which he had made a return. The justice determined, that the judgment was not a legal set-off, and gave judgment for the plaintiff.

In an action before a justice of the peace, the defendant cannot set off a judgment recovered by him against the plaintiff, before another justice, and which had been removed into this court by *certiorari*.

C. M. Lee, for the plaintiff in error.

F. C. White, for the defendant in error.

*WOODWORTH, J., delivered the opinion of the court. The defendant in error was not entitled to execution on the judgment, without giving satisfactory security to restore the debt or damages, in case the judgment should be reversed. (1 N. R. L. 396.) If the defendant in error can obtain the benefit of his judgment by set-off, it is equivalent to payment; and it would be an evasion of the spirit of this section of the statute; for it would be permitting him to do that indirectly, which he cannot do directly. It is true, that a new action may be brought on a judgment, notwithstanding a writ of error; for, although the writ of error be a supersedeas, yet it is said, the duty remains of record, and it is but reasonable the party should have this remedy. (2 Bac. Abr. tit. Error.) But, although such action may be brought, execution cannot be sued out upon the second judgment, until the writ of error be determined. (3 Term Rep. 642. *Bennet v. Black*, 2 Bac. Abr. 279.) It is contended, that if an action will lie on the judgment, it follows, that it must be the subject of set-off. But I cannot discover the analogy between the two cases. Where a second action is brought pending error, the court will protect the party bringing error, until it is determined. By allowing a set-off, the party is permitted to reap the fruit of his judgment as effectually as if he had collected the money on execution. It extinguishes so much of the plaintiff's demand; and to him, it is the same, whether he is compelled to pay the judgment on which error is brought, or bound to receive it in payment by way of set-off

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I have not met with any adjudged case, in opposition to these principles, except that of *Reynolds v. Beerling*, in 3 *Term Rep.* 188. in a note. In that case, the defendant pleaded a judgment recovered against the plaintiff, after action brought, and before plea pleaded; replication—error pending on the judgment, to which there was a general demurrer. In support of the plea, *Sullivan v. Montagu*, (*Doug.* 108.) was relied on. The court said, on the authority of *Sullivan v. Montagu*, the plea was good, and that the replication was no answer to it. This case is opposed to the principle of former decisions; the case cited from *Doug. Rep.* does not support the proposition, that a judgment on *which a writ of error is brought, can be set off, nor, indeed, does it decide any thing on that subject.

The principal case of *Evans v. Prosser*, (3 *Term Rep.* 187.) overrules *Reynolds v. Beerling*, as to every thing but the point in question; and though Judge *Buller* intimates, that, as to that point, it may be correct, a decision on that question was not called for by the case before the court, and, therefore, cannot be regarded as authority.

We are, therefore, of opinion, that the set-off cannot be supported; and that the judgment of the justice must be affirmed.

Judgment affirmed.

PENNY, *ex dem.* PENNY, *against* CORWITHE.

Though a subscribing witness to a deed, or sealed instrument, if within the jurisdiction of the court, must be called to prove its execution and delivery; yet the fact of a *rasure* of a deed, may be proved by any other person: and though made after the execution of the deed, if it was done with the consent of the parties, it does not invalidate the instrument.

EJECTMENT, tried at the *Suffolk* circuit, in *May* last, before Mr. Justice *Yates*.

The only question, at the trial, was respecting a boundary line. For the purpose of introducing an award of arbitrators, on the subject in controversy, the plaintiff offered an agreement of submission to two arbitrators, under the hands and seals of the parties, dated the 9th of *April*, 1817, to which there were two subscribing witnesses. This instrument was executed by *Theophilus Smith*; but it appeared, that his name had been struck out, by drawing a black line through it. On the back of this agreement, was endorsed an instrument or bond, dated the 16th of *April*, 1817, under the hands and seals of all the parties except *Theophilus Smith*, executed, also, in the presence of two witnesses, whose names were subscribed, by which the parties bound themselves, under a penalty, to perform the said agreement of submission.

John Leake, who was a subscribing witness to both instruments, testified, that when he signed his name as a witness to the agreement, the name of *Theophilus Smith* had not been struck out; and the judge refused to permit the paper *to be read in evidence, unless the plaintiff showed, that the *rasure*

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had been made by consent of the parties to the submission. The counsel for the plaintiff insisted, that the fact that the bond endorsed on the agreement was executed by all the parties, except *Smith*, was sufficient ground to infer, that his name had been struck out by consent; but the judge decided against such an inference, and the plaintiff excepted to his opinion. The subscribing witness was then asked as to the fact of the erasure of the name of *Smith*, and he answered, that he had no recollection whatever of the circumstance, or why, or where, or by whom it was done. And the subscribing witness to the bond, also, on being examined, gave the same answer. The plaintiff then called one of the arbitrators, but he was objected to, and his testimony overruled by the judge, on the ground, that he was not a subscribing witness to either of the instruments. *T. Smith*, who, on being examined on his *voir dire*, said, that he had no interest whatever in the suit, was asked by the plaintiff's counsel whether his name was struck out of the agreement of submission by the consent of parties; but the question was objected to, and the judge allowed the objection, and his opinion was excepted to.

A great number of witnesses were examined as to the true head of the creek. *N. Floyd*, a witness for the defendant, testified, that some years ago, *James Post* was the owner of the premises, now owned by the lessor, and *David Hallock*, owner of the premises, now owned by the defendant; that they, *Post* and *Hallock*, agreed to submit it to the witness, and *William Hawkins*, as arbitrators, to determine the true position of the head of the creek, a point in controversy between the parties; and the arbitrators, after examining the premises, fixed a stake at a point which they considered the head of the creek, in which the parties acquiesced. It appeared, that if this should be taken as the true location of the premises in dispute, the lessor of the plaintiff had no title thereto. The judge being of opinion, that the award of the last mentioned arbitrators was conclusive, the counsel for the plaintiff contended, that the second submission, whether valid or not, was a waiver of the first, and that the cause ought to go to the jury, on the testimony as *to the true head of the creek. But the judge overruled this objection, on the ground, that the second submission was ineffectual and void; and, thereupon, the plaintiff submitted to a nonsuit, subject to the opinion of the court, on the question, whether the nonsuit ought not to be set aside, and a new trial granted, on the several grounds stated in the case.

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D. Robert, for the plaintiff.

S. B. Strong, for the defendant.

Per Curiam. To prove the execution of a scaled instru-

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ment, the subscribing witness, if within the jurisdiction of the court, must be called. It is the peculiar office of such a witness to speak to the acts of signing, sealing, and delivery. But the question of rasure stands on a different footing. It is a fact, as to which the subscribing witnesses are not, particularly and exclusively, called upon to attend. In the present case, it appeared, from the evidence of the subscribing witness, that *Smith's* name must have been struck out after the execution of the instrument, and after the attestation of the witness. This fact was offered to be proved, and, also, that it was done with the consent, and in the presence of all the parties. This distinguishes this case from one where an erasure exists in a deed, and it is uncertain whether it was made before, or after the execution of the instrument. In such case, the rule is laid down by *Phillips* (p. 351.) to be, that it may be proved either by the subscribing witness, or by any other person who saw the rasure made; and, on the same principle, by any other person who can testify that he saw the rasure before the deed was executed. The evidence ought to have been admitted to show, that although *Smith's* name was struck out after the execution of the deed, it was done by the consent of all parties; for it is competent to the parties interested, to consent to an alteration in a deed, after it is executed, and then the deed takes effect, as a new execution of it.

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The instrument of the 16th of *April*, executed by the parties, and to which *Smith* was not a party, is a solemn *recognition, that the agreement to submit was between those four, to the exclusion of *Smith*; and we cannot perceive why that instrument, in itself, is not binding on the parties; but, most certainly, the evidence that *Smith's* name was struck out, with the consent of all the parties, ought to have been admitted. Had the second submission been ineffectual, as the judge considered it on the trial, his conclusion would have been right, that the former submission had settled the disputed line. If, however, it was effectual, it was a solemn waiver of the first submission, and the parties would be concluded by the line established by the last arbitrators. There must be a new trial; the costs to abide the event of the suit.

New trial granted.

LANSING against The Executrix of LANSING.

Where an executor or administrator pleads a false plea, the judgment is *de bonis testatoris, si non*

THIS was an action of *assumpsit*. The defendant pleaded *ne unques executrix*, &c. on which a verdict was found against her, and a judgment was entered thereon for the plaintiff, for 260 dollars and 45 cents, to be levied of the goods and chattels of the testator, if so much remained in the hands of the de-

fendant, to be administered ; if not sufficient, &c. then to be levied of the proper goods and chattels of the defendant. A *fi. fa.* was issued according to the terms of the judgment, on which the sheriff returned in *May* last, that he had made 50 dollars and 69 cents, and *nulla bona* as to the residue.

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Chever, for the plaintiff, moved for leave to amend the record and execution, by adding, in the judgment, the words "lands and tenements." He said, that the omission in the record was considered a clerical mistake, and amendable. (1 *Saund.* 336. note 10. 5 *Burr.* 2730.)

J. Van Rensselaer, contra, said, that the judgment in this *case being *de bonis testatoris, si non, &c. de bonis propriis*, it did not bind the lands and tenements of the executrix. If the defendant plead *ne unques executor, &c.* and it is found against him, the judgment is, as in this case, *de bonis testatoris, et si non, de bonis propriis*. (*Toller's Law of Executors*, 463, 564. 1 *Saund.* 336. a. 336, b. note.) But this is a motion to make it a judgment of the proper lands and tenements, as well as of the proper goods and chattels of the executrix.

de bonis propriis, &c. and, under the statute, if sufficient goods and chattels cannot be found, then of the lands and tenements, &c. And where the judgment, in such a case, [* 503] was entered, *de bonis* only, it was allowed, after return of the *fi. fa.*, to be amended, so that the execution might be against the lands and tenements also. (a)

Per Curiam. It is settled, that where an executor or administrator pleads a false plea, the judgment is *de bonis testatoris, si non, de bonis propriis, &c.* The sheriff has returned, that he has made of the goods, &c. fifty dollars, and *nulla bona* as to the residue. This is, undoubtedly, according to the *English* practice. But our statute (sess. 36. ch. 50. s. 7. 1 *N. R. L.* 500. 2 *Rev. Stat.* 363. § 2.) subjects the *lands and tenements*, as well as the goods and chattels of the debtor, to execution. We, therefore, grant the motion to amend, on payment of costs, so as to command the sheriff to make the debt of the goods and chattels of the executrix, *si non, &c. de bonis propriis, &c.* and if sufficient goods and chattels of the executrix cannot be found, &c. that, then, he cause the debt to be made of the lands and tenements of the executrix ; saving, however, the rights of any subsequent incumbrancer.

(a) *Vide Mechanics' Bank v. Minthorn*, 19 *Johns. Rep.* 244 *M. Michael v. Knapp*, 7 *Cow Rep.* 413.

Motion granted.

*VAN BERGEN against PALMER.

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DOWER : On the first day of the last term, the demandant was called ; and again, on the *quarto die post*, and a day was given for her to appear and prosecute her claim on the last day of the term ; and the demandant not appearing on that day, her default was entered, and a judgment of nonsuit entered thereon.

A demandant in dower may be called on the first day of the term, and if she does not appear, her default may be entered ; and if

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she does not
appear on the
fourth day of
the term, and
excuse her de-
fault, a judg-
ment of nonsuit
may be entered.

E. Williams, for the demandant, now moved to set aside the default, and subsequent proceedings, and read affidavits.

J. V. D. Scott, contra, contended, that the demandant was regularly out of court, and that the motion could not now be heard.

Per Curiam. Unless the default of the demandant, on the last day of the term, had been excused, the judgment of nonsuit ought not to be disturbed. It appears, that the demandant's attorney had died; and, without adhering to the strictness of the ancient practice, we think the facts stated in the affidavits sufficient to excuse the default.

Motion granted. (a)

(a) Vide *Sacket v. Lothrop*, 1 Johns. Cases, 249. *Booth's Real Actions*, 92. *Swift v. Livingston*, 1 Johns. Cases, 173. The tenant, in a writ of right, cannot be called before the *quarto die post*; but the demandant may be called on the first day of the term, and if he does not appear, his default may be entered; and if he does not appear on the *quarto die post*, and excuse his default, a judgment of nonsuit may be entered. (*Clobery v. Bishop of Exon*, Carth. 173. Co. Litt. 139. b.)

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*BANK OF AUBURN against THROOP.

WEED and AIKIN against the Same.

Where the maker of a promissory note, protested for non-payment, confessed a judgment in favor of the endorser, for his security, and the holders who had previously sued the maker, afterwards recovered judgment against him; and executions on both judgments were in the hands of the sheriff, though the execution on the judgment in favor of the endorser was first delivered; the court, on motion of the holders, plaintiffs in the second suit, ordered the sheriff, out of

THE defendant, *T.*, was the maker of a promissory note endorsed by *W. & A.*, plaintiffs in the second suit, which was discounted at the *Bank of Auburn*, for the benefit of *T.* The note being protested for non-payment, the *Bank of Auburn* commenced a suit against *T.*, and recovered a judgment against him on the 27th of *October*, and a *fi. fa.* was issued on the same day. *T.*, for the security and indemnity of the endorser, previously confessed a judgment in their favor, which was entered up on the 14th of *August*, and a *fi. fa.* issued thereon, on the 10th of *October*; both executions were delivered to the sheriff of *Cayuga*. The *Bank of Auburn*, plaintiffs in the first suit, having, as was stated in the affidavits, reason to apprehend, that the money raised on the execution in favor of *W. & A.*, was not intended to be applied to the payment of the judgment in favor of the bank, now applied to the court for a rule directing the sheriff of *C.*, out of the proceeds of the sale of the real and personal property of the defendant, on the executions in his hands, first to pay and satisfy the execution in favor of the bank.

Foot and Cady, in support of the motion. They cited *Smith v. Page*, 15 Johns. Rep. 395. *Lansing v. Orcutt*, 16 Johns. 386

Rep. 4. *Lambert v. Paulding*, ante, 371. *Williams v. Rogers*.
5 *Johns. Rep.* 163.

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v.
DOVER ST.

Butler, contra.

Per Curiam. We have no doubt of our power to control the process of the court, in such a case as this, for the purposes of justice and equity, and to prevent the necessity of resorting to a court of chancery. This court will take *notice of the equitable rights of parties where they are clearly ascertained; and this is a clear case, in which as full and complete justice may be done to all parties, as in a court of equity. We shall, therefore, grant the motion.

the moneys
arising from the

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sale of the defendant's property, first to pay and satisfy the second execution in favor of the holders of the note.

Rule granted.

JACKSON. *ex dem.* DACKSTADER, against KING and
NEILSON.

CADY, for the defendants, moved for an attachment against the lessor of the plaintiff, an *Oneida Indian*, for costs on a judgment of nonsuit.

Sill, contra.

The Court said, that they could not grant an attachment against the *Indian*; but as the suit had been brought by an attorney, who was not an agent or attorney appointed by the state to manage the affairs of the *Indians*, they granted a rule on the attorney of the plaintiff, to show cause why an attachment should not issue against him.

The court refused to grant an attachment for costs on a judgment of nonsuit against an *Oneida Indian*, who was the lessor of the plaintiff in an action of ejectment; but they granted a rule to show cause on the attorney who brought the suit, not being the agent or attorney appointed by the

state to manage the affairs of the *Indians* why an attachment should not issue against him

THE CORPORATION OF THE CITY OF NEW-YORK, in the
matter of enlarging and improving *Dover street*, &c.

EDWARDS, in behalf of the corporation, presented a petition, praying leave to discontinue all further proceedings in this matter.

It appeared, that in *May* term, 1818, the corporation, pursuant to the act, sess. 36. ch. 86, presented their petition *for the appointment of commissioners of estimate and assessment, relative to the enlarging, straitening, and improving of *Dover street*, and for closing a part of the said street. Three com-

Before the appointment of commissioners of estimate and assessment, for opening, en-

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larging, &c. of streets in the city of New-York, under the

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ATION OF
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act, sess. 36.
ch. 86. s. 177,
178. &c. (2 *N.*
R. L. 342. 408.
413.) the court,
on the petition
of the corpora-
tion of the city,
for that pur-
pose, will order
all further pro-
ceedings to be
discontinued.

missioners were accordingly appointed, who, in *March*, 1819, made a representation to the corporation, that they were unable to make the necessary report, for the reasons therein stated, and tendering their resignation. In *May* term, 1819, new commissioners were appointed, by an order of the court, who proceeded and made a report of estimate and assessment, and a supplemental report, as to various objections by persons interested subsequently submitted to them. This report, with the supplemental report, objections, &c. was presented at *January* term, 1820; and the court, after hearing the parties, refused to confirm the report, and appointed three other commissioners to make the estimate and assessment; but the commissioners, so appointed, refused to act. On the second day of *October* last, the mayor, aldermen, and commonalty, in common council convened, passed a resolution, instructing their counsel to apply to the court for leave to discontinue all further proceeding in the matter of *Dover street*; which resolution was, by their order, published in the city newspapers.

A motion was now made, accordingly, for leave to discontinue the proceedings.

Bogardus, in behalf of several proprietors of adjoining lots, opposed the motion. He contended, that the owners of the lots, which were to be taken for this public improvement, had, in consequence of the proceedings which had taken place, acquired a vested right to compensation, so that the corporation, after having instituted proceedings under the act, and gone on to make the estimate and assessments, had not now power to discontinue. That the corporation, under the act, (sess. 36. ch. 86. s. 177, 178, 179. 2 *N. R. L.* 342. 408. 413.) had only a delegated power; and having once passed an ordinance for enlarging and improving the street, they were bound to carry it into effect. After the ordinance had passed, and the property of individuals had been ordered to be taken for the purpose of making the proposed alterations, the owners could no longer improve or dispose of their lots; and it would be an act of injustice to them, now, after more than five years have elapsed, to discontinue the proceedings, and deny them all compensation. The proceedings under the act, after being approved by the court, are to be final and conclusive, and the corporation have no right to interfere and stop them. (6 *Johns. Rep.* 1.)

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Per Curiam. As the report of one set of commissioners has been set aside, and the others have refused to act, we consider the application as if made before the appointment of any commissioners: And before commissioners, &c. are appointed, or report made, we do not perceive how any rights can be so vested as to deprive the corporation of the power of refusing to go on, or that can require this court to deny their application
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for leave to discontinue all further proceedings. We, therefore, grant the motion to discontinue.

Motion granted.

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BURR
v.
WATERMAN

BURR against WATERMAN and WELLS.

IN ERROR, to the Court of Common Pleas, or Mayor's Court, of the city of *New-York*. The writ of error had been returned with the record, certified by the clerk of the court below, without any rule or notice for that purpose. On filing the writ and record, a rule was entered in the book of rules, kept by the clerk of this court, that the plaintiff in error assign errors in twenty days, or that his default be entered. Notice of this rule was duly served on *the attorney for the plaintiff in error, on the 27th of *October*, and no assignment of errors having been made and served, a default was entered on the 17th of *November*.

Burr now moved to set aside the default, for irregularity. He contended, that as the rules of this court were silent as to the mode of proceeding in such cases, the practice of the Court of *K. B.* in *England*, was to govern. After bail has been put in, the defendant in error enters a rule that the plaintiff in error certify or transcribe the record, in eight days. (2 *Sellon's Pr.* 374. *Richardson's K. B. Pr.* 328.) A rule for the plaintiff to transcribe the record is necessary, as the defendant cannot do it. (1 *Wils.* 35.) After the record is transcribed and returned, in order to compel an assignment of errors, the defendant in error must take out a writ of *scire facias quare executionem non*, and cause it to be returned *scire feci*, or *nihil* to an *alias scire facias*; and on this return, the defendant may enter a rule that the plaintiff appear and assign errors in four days, or be non-prossed. (*Richardson's K. B. Pr.* 329. 2 *Sellon's Pr.* 376.) This rule is to bring the plaintiff into court, as he has no day given by the writ of error. It is irregular to rule the plaintiff in error to assign errors, before the expiration of the rule to appear to the *scire facias*. (6 *Term. Rep.* 367.) The only way of proceeding, in order to non-pross the writ, is by serving a rule on the *scire facias*, and then a rule to assign errors. (*Burr. Rep.* 1772.)

On filing writ of error and return, in this court, the defendant in error, instead of issuing a *scire facias quare executionem non*, enters a rule that the plaintiff [* 509] assign errors in twenty days, or that his default be entered; and serves a notice on the plaintiff in error, or his attorney, that the writ of error has been returned and filed, and a rule has thereupon been entered that the plaintiff assign errors, &c. (u)

(a) Vide *Oppie v. Colgrove*, 19 *Johns. Rep.* 124. *Shelden v. M'Farrers*, 1 *Ibid.* 169. *Clement v. Crossman*, 8 *Ibid.* 287. *Graves v. Miller*, 1 *Ibid.* 509.

—, contra.

Per Curiam. It has been the uniform practice in this court, for a great many years, instead of issuing a *scire facias quare executionem non*, according to the *English* practice, to enter a rule, on the return of the writ of error, that the plaintiff in error

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assign errors in twenty days, or that his default be entered. The defendant in error gives notice to the plaintiff in error, that the writ has been returned and filed, and that thereupon a rule has been entered, that the plaintiff in error assign errors, &c. This notice must be served on the plaintiff in error, or his attorney. This we *consider to be the settled and established practice of this court; and there has, therefore, been no irregularity on the part of the defendant in error. But as there appears to have been a misunderstanding as to the practice, we shall grant the motion to set aside the default, without costs.

Motion granted accordingly.

LION, *ex dem.* EDEN & WOOD, *against* BURTIS and
the BANK OF NEW-YORK.

In ejectment, before trial, the declaration may be amended by enlarging the term, or adding a new demise, on payment of cost. But where there was an actual entry and actual lease, for the purpose of avoiding a fine, and the demise in the declaration was, by mistake, laid on the first instead of the sixth day of May; the court, in allowing the

[* 511] amendment, gave the defendant leave to elect, in 20 days, whether to defend the suit or not; and if he chose to defend, then to have the costs of the amendment only; but if he abandoned his defence, then he should be entitled to costs to the time of his election.

Whether, in such a case, the judge, at the

IN the above cause, and nine other suits on the same demises, *Burr*, for the plaintiff, moved for leave to amend the first count of the declaration, by inserting the *sixth* day of May, instead of the "first day of May," 1819. And for leave to amend the demise in the *third* count, in each of the declarations, by striking out the words, "*John Wood*, otherwise called *John Wood, Junr.* assignee of *Medcef Eden*;" and, also, by striking out the words, "in the year aforesaid," and inserting in their place, the words, "in the year of our Lord, 1813." And for leave to entitle the declarations, specially, as "of *Saturday*, the eighth day of May, 1819."

The above entitled cause was tried at the last sittings in the city of *New-York*. It appeared that the President, Directors, and Company of the *Bank of New-York*, had caused a fine to be levied on the premises, in *January*, 1817; and *C. B. Goelet* became seised of the premises in fee simple, by virtue of a deed from them, dated *April* 16, *1816, for the purpose of making him a tenant to the *precipe*. Actual entries were, therefore, made on the premises, and actual leases executed and delivered to *Edward A. Lion*, one of the lessors of the plaintiff, dated the *sixth* day of May, 1819. The plaintiff gave no evidence of any title or entry before the sixth day of May, 1819, nor of any title in *John Wood*, nor of any joint title in *Medcef Eden* and *John Wood*. At the trial, the defendant's counsel moved for a nonsuit; but the judge overruled the motion, and permitted the trial to proceed. A verdict was found for the plaintiff, subject to the opinion of the court on a case to be made, with liberty to either party to turn the same into a special verdict.

Burr, in support of the motion cited, 2 *Burr*. 669. 1159. 2447. *Cowper*, 841. 3 *Taunt.* 81. 2 *Bos. & Pull.* 243
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7 Term. Rep. 474. 1 Washington's Rep. 313. 4 Yates's Rep. 483. 7 Cranch, 471. 2 Sergt. & Rawles's Rep. 291.

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Johnson, contra.

Per Curiam. With respect to the causes which have not been tried, there can be no objection to granting the amendment asked for. The court have permitted a new demise to be added six years after service of the declaration. (1 *Caines*, 251.) The application here is to amend the day of the demise, to make it conformable to an actual lease, made after entry to avoid a fine. This amendment may be important, and deprive the defendants of the only defence they had to make. They must, therefore, have twenty days to elect, whether they will continue to defend; and in such case, the defendants will be entitled to costs of the amendment only; but if they elect to abandon the defence, then they must be paid their costs up to the time of making their election.

In the cause already tried, in which, also, the plaintiff asks to amend the demise, and make it conformable to the day when the entry was actually made and the lease was executed, to wit: the 6th of *May*, instead of the 1st of *May*, there is more doubt. It appears by affidavit, that the mistake was a clerical one. The objection was taken at the trial, and a motion was made that the plaintiff be nonsuited, on the ground that the demise was laid on a day anterior to the sealing of the lease; and that the entry being made to avoid the fine, it was a demise before the lessor's title accrued. In deciding on this motion, we purposely avoid giving any opinion on the validity of the objection. It is not pretended by the defendants, that they did not bring forward their whole defence, or that any injury will be done them by the amendment, farther than to remove a mere technical objection. The question, then, arises, how far we ought to allow amendments in furtherance of justice, as to mere formal mistakes, arising from clerical errors, when the substantial rights of one party will be promoted by the amendment, and the other party is no otherwise prejudiced, than by depriving him of a formal objection. As yet, we have not gone the length, of making such amendments after a trial; but, upon full consideration, we perceive no objection to going that length. We have all seen, with regret, objections taken at trials, on the score of variance, which have defeated and turned round the plaintiff to another action, contrary to the justice of the case; by which means the plaintiff has been subjected to delay, and mulcted in costs. In *Holland v. Hopkins*, (2 *Bos. & Pull.* 244.) the plaintiff had been nonsuited at the trial, on the ground that the evidence offered did not conform to the bill of particulars delivered; and although the court concurred in the opinion of the judge who nonsuited the plaintiff, they set aside the nonsuit, and gave the plaintiff leave

trial, can allow the amendment to be made?

If the objection on the ground of variance is made at the trial, and the plaintiff is nonsuited, it seems, that the court will set aside the nonsuit, and give leave to amend on payment of costs.

Where the judge, at the trial, refused to nonsuit, but reserved the question as to the variance, and the defendant went into his

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defence fully at the trial, the plaintiff was allowed, after verdict, to amend his declaration, on the usual terms, under the circumstances of the case, it being a mere clerical mistake. (a)

(a) Vide *Jackson*, ex dem. *Harri*, v. *Murray*, 1 *Cowen's Rep.* 153. *Jackson*, ex dem. *Sinclair*, v. *Bailey*, 5 *Ibid.* 235. *Jackson*, ex dem. *Hill*, v. *Tuttle*, 6 *Ibid.* 590.

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to amend his bill of particulars, on payment of costs. In *Grundy v. Mell*, (4 Bos. & Pull. 28.) the court, after trial, amended the informality in the issue, which was, by mistake, to the court, instead of the country; and in *Holland v. Abrahams*, (3 Taunt. 81.) the action was on a replevin bond, and there was a fatal variance in setting out the goods replevied, upon which the plaintiff was nonsuited. *Bayley*, Justice, before whom the cause was tried, said, if he had been a judge of the court where the action was brought, he would have amended the declaration *pro tanto*, at the time of the trial. Afterwards, on motion, the nonsuit was set aside on payment of the costs.

These cases are cited as by no means authoritative, but to show the increasing liberality of courts at law in allowing amendments, to obviate objections arising from mistakes from which the most acute and eagle-eyed practitioner is not always free. We do not intend to carry the practice so far as to amend at the trial: but we mean to say, that when a plaintiff has been nonsuited for a variance in the date of the instrument declared on, or for any other variance arising from clerical mistake, that we will set the nonsuit aside, and give leave to amend on payment of costs. There may be cases in which the judge at the trial will use a sound discretion in suffering the plaintiff to take a verdict, and put the party to his application to the court to make the amendment. It may be discreet to adopt this course, where the defendant has not been taken by surprise, and where his whole defence has been gone into, or where he is prepared to go into it. By allowing amendments, under these guards, we think we are adopting a course of procedure, that will advance justice, and get rid of technical and more formal objections, which have no reference to the merits of a cause.

In the present case, as the judge did not nonsuit the plaintiff for the variance, but reserved the point, and as the defendants went into their defence fully, we grant the amendment on the usual terms.

It is not very easy to lay down any general principles on this subject. The cases that have been put, in which we would allow amendments to be made, may serve to illustrate our general views; but every case will depend upon the circumstances peculiar to it. We mean to be understood, however, as deciding, that in fit cases we will allow amendments to be made after trial; and that the present is a case in which the amendment ought to be allowed.

Rule accordingly. (a)

(a) The first mentioned amendment only was granted. *Vide Adams on Ejectment*, 200. 203. and notes.

CASES

ARGUED AND DETERMINED

IN THE

Court for the Trial of Impeachments

AND

THE CORRECTION OF ERRORS

OF THE

STATE OF NEW-YORK,

IN APRIL, 1820.

BENJAMIN S. ANDERSON and JOHN ANDERSON, appellants,
against
ROBERT ROBERTS and SAMUEL BOYD, respondents.

APPEAL from the Court of Chancery. The bill stated, that *Robert Roberts*, being a creditor of *William Griffith*, with a view to secure some part of his debt, on the 22d March, 1810, purchased a bond and mortgage executed by *Griffith* to *Aaron Lyon*; the mortgage being on part of a lot of ground in the village of *Newburgh*, and was registered on the 29th of May, 1806. *Roberts* having paid *L.* the consideration of 214 dollars and 25 cents, and received an assignment of the bond and mortgage, took possession of the mortgaged premises, together with the residue of the lot, and the house thereon, and let the same to *Hector M'Leod*, who entered into possession thereof, as his tenant. *Benjamin Taylor*, who had obtained a judgment *against *G.* on the 14th of May, 1808, for 128 dollars and 10 cents, issued an execution thereon, by virtue of which the premises were sold by the sheriff, at public auction, to the highest bidder, *Samuel Boyd*, for thirty dollars, and the sheriff executed a deed of the premises, accordingly, to *B.*, who made the purchase merely as trustee for the respondent, *Roberts*. The bill further stated, that *G.* being indebted to several creditors, and there being suits pending against him,

The provision in the sixth section of the act to prevent frauds, (sess. 10. c. 44. 1 N. R. L. 75. 2 Rev. Law. 134.) applies to both the second section of the act, or 13 Eliz. ch. 5. and to the third section of the same act, or 27 Eliz. ch. 4; and that whether the

[* 516] conveyance is from the fraudulent grantor, or the fraudulent grantees.

The same rule of construction is applied to both sections or statutes.

IN ERROR.

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And there is no difference between a deed to defraud subsequent creditors, and a deed to defraud subsequent purchasers.

A *bona fide* purchaser, therefore, for a valuable consideration, without notice of the fraud, whether he purchases from the fraudulent grantor or the fraudulent grantee, is protected by the statute; such fraudulent conveyances not being absolutely void, but voidable only at the instance of the party aggrieved. The purchase from the fraudulent grantee, however, must be prior in time to

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a *bona fide* purchase from the fraudulent grantor, or to a sale on execution, at the suit of a creditor.

Where a bill is in the nature of a bill for a new trial at law, equity will not sustain it.

in order to defraud his other creditors, did, on the 20th of *January*, 1810, convey the mortgaged premises to one *Sarah Johnson*, for the nominal consideration of 2,000 dollars, and, by another deed, conveyed to her the other part of the lot for the nominal consideration of 1,500 dollars. The bill charged that these conveyances were collusive and fraudulent; and that *S. J.* never having paid any consideration for them, she was a mere trustee for *W. G.*; and that the land was, afterwards, reconveyed to him, before *Isaac Clason* obtained his judgment against *Sarah Johnson*; and that he continued to possess and enjoy the property as his own after those conveyances. That, in 1811, the defendants, pretending to claim the land under a deed from the sheriff, on a sale of the premises, the 1st of *January*, 1810, by virtue of an execution on the judgment in favor of *Isaac Clason* against *S. Johnson*, brought an action of ejectment against *M'Leod*, and obtained a verdict against him, on producing the deed from the sheriff, and proving that on the first of *May*, 1810, *M'Leod* took a lease from the appellants. The bill charged that the lease so taken by *M.* from the appellants, being after he became tenant to the respondents, was void, and the attornment fraudulent. The bill prayed that the conveyances from *W. G.* to *S. J.* might be declared fraudulent and void, and that the sheriff's deed to the appellants, and all other deeds from *S. J.*, or any grantees under her, to the appellants, of the premises, or any parts thereof, might be declared fraudulent and void, and be delivered up to be canceled; and that all proper parties might release to the respondent *R.* and for an injunction, &c.

The defendants, in their answer, denied all knowledge of the claim of the respondents against *G.* They admitted the mortgage from *G.* to *Lyon*, but alleged that they were ignorant of the assignment to *Roberts*, or of any lease from him to *M'Leod*; and denied that *Roberts* had any possession, legal or constructive, of the premises. They averred, that there was no judgment against *G.* when he conveyed the premises to *Sarah Johnson*. That *B. S. Anderson*, and *S. B. and N. Boyd*, were present at the sale by the sheriff, under *Taylor's* judgment; and that they were informed by *Anderson* of his purchase under *Clason's* judgment; that the judgment of *Clason* was obtained against *S. J.* the 15th of *May*, 1809, for 346 dollars and 88 cents; and on the 13th of *December*, 1809, the premises were sold under an execution on that judgment, subject to all prior incumbrances; *B. S. Anderson*, appellant, became the purchaser, for one dollar and fifty cents, and his father, *J. A.*, became jointly concerned with him in the purchase. *S. J.* had executed a mortgage of the premises to *D. Stansbury*, for 496 dollars and 88 cents; and *W. King* had some equitable claim on the property; and the appellants agreed to pay *S. J.* 167 dollars, and take a release, or quit-claim, of her right; to discharge *Stansbury's* mortgage, and pay *W. K.* 300 dollars for his lien, which

was accordingly done, on the 21st of *March*, 1810. The appellants alleged that they had not heard of the claim of the respondents, until after they had paid all these sums of money, and denied all notice, and every charge of fraud or collusion; and claimed to hold, as *bona fide* purchasers, without notice. That they tendered to the respondent, *Roberts*, 250 dollars, the amount of the mortgage to him, &c.

A *replication* was put in, and witnesses examined, and proofs taken by the parties. The material points proved, appear in the opinion of the court.

The cause was brought to a hearing in the Court of Chancery, in *June*, 1818. The chancellor decreed that the two deeds to *Sarah Johnson* were fraudulent and void, and that the plaintiffs ought to be quieted against any claims on the part of the defendants under those deeds, and that a perpetual injunction be issued for that purpose.

THE CHANCELLOR assigned his reasons for the decree. (*Vide S. C. 3 Johns. Ch. Rep. 371.*) (a)

**Mitchill*, for the appellants. 1. The appellants had a complete title under the sheriff's sale; and if *S. Johnson* had any title, it was acquired by the appellants, for a valuable consideration. The tender of the money due on the mortgage, was equivalent to a payment; and the *lien* was thereby destroyed (*Cro. James*, 244. *Co. Litt.* 207, 208, 209.) On this title, the action of ejectment was brought against *M'Leod*: and the first objection to the decree of the Court of Chancery is, that *M'Leod* should have been made a party. The rule is well settled, that all persons interested should be made parties. (*Malin v. Malin*, 2 *Johns. Ch. Rep.* 238. *Coop. Equ. Pl.* 33.) Now, *M'Leod* was interested, for there had been a recovery against him in ejectment, and also for *costs*, in the Supreme Court. This objection, either on demurrer, or at the hearing, is fatal.

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(SPENCER, Ch. J. Was this objection made at the hearing?)

It was stated in the *answer*, which was read at the hearing. *M'Leod* was the only person interested as to the mesne profits. The injunction was for quieting the possession. (1 *Vernon*, 156.)

(VAN NESS, J. It has been settled by this court, that matters not suggested at the hearing, nor decided upon by the chancellor, cannot be made the ground of error here.)

2. There is no equity on the part of the respondents. The matters for which they seek relief are properly cognizable in a

(a) *Vide Sterry v. Arden*, 1 *Johns. Ch. Rep.* 261. Same case on appeal, 12 *Johns. Rep.* 536. *Sands v. Hildreth*, on appeal, 14 *Johns. Rep.* 493.

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court of law. *Roberts* alleges merely that he shall be put to great expense to recover at law. He avers that *M'Leod* was his tenant. He might, then, have been made a co-defendant in the action of ejectment, and have set up his claim as a defence. If *Roberts* had no right to come into a court of equity, the other respondent had not. This is, in effect, an attempt to get a new trial in a court of equity, on the same grounds which they might have set up as a defence at law.

3. The depositions of *Sarah Johnson*, and *Thomas Allen*, ought not to have been rejected by the chancellor. *S. J.* was not interested; but if she was, she or her heir ought to *have been made a party to the suit. No action for a *deceit* would lie; for the *deceit* and the *scienter*, both of which are essential to the action, could not be alleged. And if there had been covenants, an action of covenant would not lie. The deposition of *Allen* was taken *de bene esse*, at law, and he was dead when it was offered. When it was taken, *Roberts* was his landlord. There was a privity between them. And such evidence is binding on the parties and their privies.

4. The appellants were *bona fide* purchasers, for a valuable consideration, and without any notice of fraud. If there were defects in the title of *S. J.*, on the ground that she was a fraudulent grantee, that cannot affect the appellants, who are *bona fide* purchasers. The second section of the act, (1 *N. R. L.* 75. *sess.* 10. *ch.* 44. 2 *Rev. Stat.* 134.) contains the 13 *Eliz.* c. 5. and the third section embraces the stat. of 27 *Eliz.* c. 4. Each of those statutes contained a *proviso*, in favor of *bona fide* purchasers; both of which *provisoes* are incorporated together in the sixth section of our act. The respondents claim as *creditors*, and they must show that they are fair *bona fide* creditors, not creditors for the sake of speculation, or to defeat a *bona fide* purchaser. The appellants were *bona fide* purchasers, for a valuable consideration; and in their answer, under oath, have denied all knowledge or suspicion of fraud or defect of title, when they purchased. The appellants, then, present a case under the second section of the act, or the 13 *Eliz.* c. 5. and claim the benefit of the *proviso*, contained in the sixth section, the language of which is broad, and extends to any person purchasing *bona fide*, without any notice or knowledge of the covin, fraud or collusion. It is settled, that a *bona fide* purchaser from a fraudulent grantee, has a good title against a subsequent purchaser from the fraudulent grantor. (1 *Sid.* 133. *Skin.* *R. p.* 423. 4 *Bos. & Pull.* 332. 3 *Lev.* 387. *Comb.* 247.) As between the parties themselves, the title of the grantee is perfect. At the time the fraudulent grantee conveys, he has a title, and the purchaser, except as to creditors, has the rightful title. The fraudulent grantee acquires all the rights which the grantor had; and as the grantor may sell, so may the grantee *Though, as to an existing creditor, the sale may be fraudulent yet it is not so, in regard to a subsequent creditor. If we are

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charged with an absurdity, we answer, that the other side are equally absurd. But the *proviso* to this act avoids all absurdity. It says, that when a *bona fide* purchaser appears, the original deed shall not be void; though it would have been before. It will be said, that the *proviso* applies only to the original conveyance, or the first grantee. But the *proviso* speaks of *collusion*, which could not be as between original grantor and grantee. *Holt*, Ch. J., (*Skinner*, 423.) says, the *proviso* saves the subsequent purchaser. In the case of *Preston v. Crofut*, (1 *Day's Conn. Rep.* 527. *note*.) so much relied on, the very judges who pursued the same course of reasoning, as was taken by the chancellor, admit, that in *England*, it is the *proviso* which protects the *bona fide* purchaser; but the *Connecticut* statute has no such *proviso*. It is said that *policy* is against the construction for which we contend; that though the debtor or fraudulent grantor may sell, yet if the fraudulent grantee be allowed to sell, the creditors lose all chance of being paid. But is not the money in the pocket of the fraudulent grantor, as much beyond the reach of creditors as it would be in that of the fraudulent grantee?

Again; the doctrine on which the decree in this case is founded, is not only contrary to the *English* adjudications, but must lead to dangerous consequences. A fraudulent grantee cannot be protected by the statute of limitations; and a purchaser from him is equally unprotected by it. If so, then a remote purchaser, after the lapse of fifty years, would be liable to have his title defeated, by this alleged defect in the title of a fraudulent grantee. And this, too, in favor of *creditors*, who are not entitled to protection so much as *bona fide* purchasers. The purchaser's lien is specific. The creditor has a right against all the property of his debtor. The sound doctrine is, that the *bona fide* purchaser is equally protected as a creditor, by the *proviso* in the statute. (*Rob. Fraud. Conv.* 495. *Comb.* 222. 9 *Vesey*, Jun. 190. 2 *Blk. Com.* 449. *Cowp.* 711. 1 *Wash. Rep.* 199. 217. 1 *Madd. Ch.* 217. 5 *Co.* 60. b. 2 *Bro. C. C.* 148. 3 *Johns. Ch. Rep.* 147. 345.)

**Boyd* and *S. Jones*, jun. contra: 1. There was no objection as to the jurisdiction of the court, made at the hearing, though it was suggested in the answer, that the remedy was at law, not in equity. This court will not now listen to this technical objection. Besides, the object of the bill was to get rid of conveyances alleged to be fraudulent, and which impeded the respondent's recovery at law. A court of equity has, at least, concurrent jurisdiction, as to fraud.

2. As to the objection, that *MLeod* should have been made a party. If he had been a party, the appellants would have demurred to the bill, because he was their tenant. Admitting that he was a tenant of the respondents, as the term had expired, he had no interest. As to *costs*, we shall not

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touch them. The decree goes only to quieting the possession, and stays any proceedings to disturb it. As to the *costs* in the ejectment suit, the parties are left to their legal rights. As to the *deposit* in court, the respondents having gained their cause, were entitled to take it back; but that is a mere point of practice in the court below. No objection was made in the court below, as to the competency of the proof of the two assignments; and it is, at best, but mere matter of form.

As to the depositions of *Sarah Johnson* and *Thomas Allen*; *S. J.* being, herself, *particeps fraudis*, she ought not to be allowed to testify. But we put the objection on the ground of *interest*. She had given a deed with a warranty; and, as the chancellor added, she would have been liable to an action for a deceit. But if her deposition had been received, it could not have, in the least, varied the decree. *Allen's* deposition was taken in an ejectment suit, to which the respondents were not parties; and they alleged, in their answer, that *M'Leod* was their tenant.

3. But the only important question is, as to the construction of the statute of frauds. The testimony of *T. W. Smith* shows, that there was gross and palpable fraud in fact. The appellants, being purchasers under *Taylor's* judgment of the 14th of *May*, 1808, stand in the place of the judgment creditor, and are entitled to all his rights. The debt, in fact, accrued the 2d of *February*, 1808. (*Sands v. Hildreth*, *14 *Johns. Rep.* 498.) The appellants are subsequent purchasers in 1809. May not the respondents avail themselves, also, of the mortgage to *Lyon*, executed on the 23th of *December*, 1805, and registered the 29th of *May* following, to defend themselves against the fraudulent conveyances? Thus, as purchasers under the judgment, the respondents were judgment creditors at the time of the fraudulent conveyances, and as assignees of the mortgage, they are also creditors of *G.* A creditor, at the time of the fraudulent conveyance, has a right to set it aside; and so has a subsequent creditor. A deed, void as to creditors, is void for the benefit of all creditors. If void at the time, it is so to all intents and purposes, thereafter, as to creditors of the grantor. If, then, *Taylor* was a creditor, the deed was void as against him, and his judgment attached, and the property was sold under that judgment. *G.*, in 1808, therefore, had no right or title remaining in him. As to the mortgage by *S. J.* to *Stansbury*, mentioned in the answer, it no where appears in the case; and if any reliance were placed on it, it should have been produced. The title, then, of the respondents, is clear and unimpeached.

Again; as against creditors, a deed by a fraudulent grantee, to a *bona fide* purchaser, without notice, has been uniformly held void, under the statute of 13 *Eliz.* c. 5. Not a case to the contrary is to be found in the *English* books. A fraudulent grantee is incapacitated from making any conveyance to

the prejudice of the rights of third persons ; because, such deed is, *ipso facto*, void, and of no effect, as against creditors ; and because the grantor in such a deed, is so circumstanced that he cannot convey without fraud. If the statute makes the conveyance utterly void as against creditors, it is absurd to say, that the grantee of such fraudulent grantor can convey a valid title. No inference can be drawn from the decisions as to *voluntary* conveyances. A voluntary deed is legal and valid in its inception ; it is not fraudulent merely because the grantor is indebted, unless he is insolvent, or the conveyance is made under circumstances showing an intention to defraud creditors. The *second* section of the act avoids all conveyances made to defraud creditors ; the *third* section avoids *conveyances made to defraud *bona fide* purchasers. Under the *second* section, the deed is utterly void ; for as long as any creditor remains unpaid, he cannot be defeated by any act of the fraudulent grantee ; the estate, as regards the creditors, remains in the grantor, and never passes to the fraudulent grantee. Under the *third* section, as to purchasers, the deed is good as between the parties, until a purchaser appears.

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(SPENCER, Ch. J. And is not a deed made to defraud creditors, good, until the creditors take measures to avoid it ?)

We apprehend not ; for none but a judgment creditor can take measures ; and then it would be a statute to protect *judgment* creditors only, who want no protection. The only sound doctrine, and without which the statute would be forever defeated, is, that as to creditors, the deed is utterly void. The *proviso* in the act applies to voluntary conveyances, and is intended to protect a *bona fide* purchaser of the grantee. But when the case of a *creditor* arises, the deed is absolutely void as to him, and the *proviso* does not apply. The object was to eradicate *fraud*, to reach the monster in the inmost recesses of his den. But if a conveyance from a fraudulent grantee is to be sustained, there is no possibility of stopping his ravages. The statute of 13 *Eliz.* c. 5. has the same *proviso* ; not a case, however, is to be found in *England*, under that statute, in which such a conveyance is held good ; though the decisions under the 27th *Eliz.* are numerous. This shows, most conclusively, what has been the uniform construction of the former statute. This question was very much discussed in the case of *Preston v. Crofut.* (1 *Day's Conn. Rep.* 527. n.) It was a very strong case ; yet the Supreme Court of *Connecticut* decided, that the conveyance was void as to the creditors of the original grantor. In *Sands v. Codwise*, (4 *Johns. Rep.* 536. 598.) the *chief justice* held the deeds made to defraud creditors, as absolutely void, to all intents and purposes.

Again ; there are peculiar features in this case, to show that

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the appellants are not *bona fide* purchasers. They *bought for one dollar and fifty cents. *S. J.* never took possession under the fraudulent deeds; but the possession remained as it was before. What right had *A.* to purchase of a fraudulent grantee out of possession? It is true, the appellants deny all notice of the fraud; but they did not inquire, though there was enough to put them on inquiry. It was their duty to inquire of the tenant in possession who was the real owner of the property. They purchased at their own risk; and if they did not inquire, they are chargeable with notice. There was, at least, constructive notice. The denial in the answer is only of actual notice.

Burr, in reply, discussed the facts in the case, and contended, that it was not a proper subject for a court of equity; but that the respondents should have sought relief at law. That this objection to the jurisdiction of the court was always good, and might be made in any stage of the cause. (2 *Bro. P. C.* 39. 3 *Bro. P. C.* 539. 542. 4 *Bro. P. C.* 385. 692. 700. 7 *Bro. P. C.* 437. 1 *Bro. C. C.* 573. *Cooper's Equ. Pl.* 143. 189. 1 *Madd. Ch.* 140—142.)

The appellants, in their answer, positively deny all notice whatever of fraud; and the answer will prevail against a single witness. (*Cooper's Equ. Pl.* 145, 146.) As to the construction of the statute, he contended, that the *proviso* applied to both sections, and protected a *bona fide* purchaser of a fraudulent grantee, without notice; that there was not a decision to the contrary, except that in *Preston v. Croft*; and *Reeves, J.*, admits that the *proviso* makes all the difference, there being no *proviso* to the statute of frauds in that state. He referred to the argument of the learned counsel for the defendant in that case, (*Gould*) as luminous, cogent, and perfectly conclusive. And the counsel (*Daggett* and *Sherman*) who argued on the other side, admitted, that if the statute of *Connecticut* had contained the same *proviso* as the *English* statute, it would have precluded all controversy on the question.

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SPENCER, Ch. J. The principal question which has been discussed, is not free from difficulty. It is one that *ought to be definitively settled. Indeed, it is matter of surprise, that a statute of such long standing as the 13th of *Eliz.* ch. 5. should not have received a settled construction in the *English* courts. The want of authority on this point makes neither for nor against either of the parties. The second section of our statute (1 *N. R. L.* 75. 2 *Rev. Stat.* 134.) for the prevention of frauds, is a transcript, substantially, from the 13th of *Eliz.* ch. 5.; and the 3d section of the same statute is a transcript of the 27th of *Eliz.* ch. 4. To both the British statutes there was nearly the same *proviso* as is contained in the 6th section of our statute. It provides and enacts that the act, or any

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thing contained therein, shall not extend or be construed to impeach, defeat, make void, or frustrate *any conveyance, &c.* of, in, to, or out of any lands, &c. goods or chattels, at any time heretofore had or made, or to be made, upon or for good consideration, and *bona fide, to any person, &c.* not having at the time of such conveyance or assurance made, any manner of notice or knowledge of such covin, fraud, or collusion as aforesaid.

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The chancellor admits the law to be settled, that under the 27th of *Eliz.* a purchaser for a valuable consideration, and without notice, from a voluntary or fraudulent grantee, shall be preferred to a subsequent purchaser, for valuable consideration from the original grantor. The cases he has cited, show that such has been the uniform construction of cases arising under the 27th of *Eliz.* *Sugden (Law of Vendors, 436.)* and *Newland (on Contracts, 404.)* consider this construction as entirely settled. But the chancellor is of opinion that a different rule of construction prevails under the 13th of *Eliz.* which protects creditors from fraudulent conveyances by their debtors. His idea is, that the statute, in its enacting clause, operates on the deed from the fraudulent debtor, and that the proviso in the act applies to that original conveyance from the debtor, and saves it, when made to a *bona fide* purchaser, for valuable consideration; and that such a conveyance is supported by the proviso, however fraudulent the intention of the grantor may be; that the original deed from the debtor to a fraudulent grantor, is utterly void as to creditors, and, as against them, the grantee can make no conveyance, for he has no title, as *against them, on the ground that the proviso does not extend to such subsequent conveyance by the fraudulent grantor. He thinks that the contrary doctrine would defeat the policy of the act; and that there is no analogy between a conveyance by the grantee under the 27th and under the 13th of *Eliz.*; for, in the former case, he has a good title until the conveyance from him, or from the first grantor to a *bona fide* purchaser, takes place; whereas, in the latter case, his title, as against the creditor, was absolutely void from the beginning. I cannot assent to the correctness of these positions. On the contrary, it appears to me, there is a strong, close, and decisive analogy between the two statutes; and the proviso in the 6th section of our statute illustrates the sense of the legislature, that the same construction is applicable to both the statutes. It has been suggested by the *chancellor*, that in the revision of our laws, the provisos to the *British* statutes were consolidated in the 6th section of our statute; and that the principle is, that the construction is to be the same since, as before the revision. I apprehend, that the provisos to both statutes are alike, and that there never has been a difference of construction upon them. Indeed, it has been admitted on all hands, that we are

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The main position on which the difference of construction rests, is, that the original deed from the debtor to a fraudulent grantee, is "utterly void" as to creditors. This ground entirely fails, for the statute of 27th of *Eliz.* provides, that all conveyances, made to defraud purchasers, shall be deemed and taken to be "utterly void, frustrate, and of none effect." It is true, that there may be this difference between the statutes; a conveyance to defraud purchasers generally operates only on those who purchase of the original grantor, subsequent to the fraudulent conveyance; whereas, a conveyance to defraud creditors may, and in most cases is, intended to defraud existing creditors; but it is an undeniable proposition, and such has been the uniform course of decision, that the statute of 13th of *Eliz.* equally protects creditors whose debts accrue subsequent to the fraudulent conveyance, as those whose debts were due when it was made; and *I cannot perceive the least difference between a conveyance to defraud subsequent creditors, and a conveyance to defraud subsequent purchasers. The 13th of *Eliz.* declares a conveyance to be void only as against creditors, &c. attempted to be defrauded, whilst the 27th of *Eliz.* declares the conveyance to be void only as against those who have purchased, or may purchase; but, as against the fraudulent grantors, in both cases, the conveyances are valid and effectual, and wholly unaffected by the provisions of either statute. What becomes, then, of the estate, and in whom is it vested, after a conveyance made to deceive existing creditors, or those who become creditors subsequent to the fraudulent conveyance? As against the grantors, the conveyance is effectual. Subsequent creditors having no debt due at the time, the possibility of their having debts cannot prevent the conveyance from taking effect. Those creditors whose debts are due, even if they have obtained judgments, and acquired a *lien*, have gained no vested interest in the lands; and they may be paid, without resort to the land fraudulently conveyed. The fee is not in abeyance, and the inevitable conclusion is, that the legal title has vested in the fraudulent grantee, subject to be divested, if the creditors see fit to call in question the fraudulent conveyance, and after the creditor has proceeded to sell, on execution, the lands thus fraudulently conveyed. This was so decided in the Supreme Court in *Osborne v. Moss*, (7 *Johns. Rep.* 161.) and in *Hawes v. Leader*, (*Cro. Jac.* 270. and *Yelv.* 196.) In both cases, it was decided, that if goods were conveyed to defraud creditors, the conveyance was void only as against them, but remained good as against the party, his executors and administrators.

In my judgment, the error of those who assert, that a fraudulent grantee under the 13th of *Eliz.* takes no estate, because

the deed is declared to be *utterly void*, consists in not correctly discriminating between a deed which is an absolute nullity, and one which is voidable only. No deed can be pronounced, in a legal sense, utterly void, which is valid as to some persons, but may be avoided, at the election of others. In 2 *Lilly's Abr.* 807. and *Bac. Abr.* tit. *Void and Voidable*, we have the true distinction. A thing is void which is done against law, at the very time of doing it, *and where no person is bound by the act; but a thing is voidable which is done by a person who ought not to have done it, but who, nevertheless, cannot avoid it himself, after it is done. *Bacon* classes under the head of acts which are absolutely void, to all purposes, the bond of a *feme covert*, an *infant*, and a person *non compos mentis*, after an office found, and bonds given for the performance of illegal acts. He considers a fraudulent gift void, as to some persons only, and says it is good as to the donor, and void as to creditors. Whenever the act done takes effect as to some purposes, and is void as to persons who have an interest in impeaching it, the act is not a nullity, and, therefore, in a legal sense, is not utterly void, but merely voidable. Another test of a void act or deed is, that every stranger may take advantage of it, but not of a voidable one. (2 *Leo.* 218. *Viner*, tit. *Void and Voidable*, A. pl. 11.) Again; a thing may be void in several degrees: 1. void, so as if never done, to all purposes, so as all persons may take advantage thereof; 2. void to some purposes only; 3. so void by operation of law, that he that will have the benefit of it, may make it good. (*Viner*, tit. *Void and Voidable*, A. pl. 18.) In *Prigg v. Adams*, (2 *Salk.* 674.) the defendant justified as an officer, under a *ca. sa.*, on a judgment in the Common Pleas, upon a verdict of 5s., for a cause of action arising in *Bristol*. The plaintiff replied, the private act of parliament, for erecting the *Court of Conscience in Bristol*, wherein was a clause, that if any person bring such action in any of the courts at *Westminster*, and it appeared upon trial to be under 40s., that no judgment should be entered for the plaintiff; and that if it be entered, that it shall be *void*. Upon demurrer, the question was, whether the judgment was so far void, that the party should take advantage of it in this collateral action. The court held, that it was not void, but voidable only, by plea or writ of error. Upon authority, therefore, I insist, that the expressions in the statutes of 13th and 27th of *Eliz.*, that conveyances, in contravention of those statutes, shall be deemed *utterly void*, &c. must necessarily be construed, as voidable only by the party aggrieved. It seems to me, that the construction upon the 27th *Eliz.*, in which the *same words are used, is applicable to the 13th of *Eliz.* In the present case, the respondents claim the premises under a judgment obtained against *Griffith*, the fraudulent grantor, subsequent to the fraudulent conveyance to *Sarah Johnson*; so that, when the deed was given to her,

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This point has been decided in the Supreme Court, in the case of *Jackson, ex dem. Merrit, v. Terry*, (13 *Johns. Rep.* 471.) The plaintiff deduced a title under *A. Turner* to *J. Turner*, for the consideration of 400 dollars, by a deed dated the 24th of *September*, 1804, and a deed from *J. Turner* to the lessor, dated the 9th of *April*, 1806. The defendant gave in evidence a judgment, on the fourth *Tuesday of September*, 1804, in favor of one *Hubbard*, against *A. Turner*, and a sale under an execution thereon, to one *Wood*, on the 10th of *April*, 1805. *Thompson*, Ch. J., in giving the opinion of the court, admitted, that the conveyance from *A. Turner* to *J. Turner* was a gross fraud, and made expressly to avoid *Hubbard's* judgment; but that the lessor, being a *bona fide* purchaser from *J. Turner*, without knowledge of the fraud, he was not to be prejudiced by it; and judgment was given for the plaintiff. In the case of the lessor of *Hartly v. M^r Anutty*, (4 *Yeates's Rep.* 95.) it was decided, that a voluntary conveyance to defraud creditors, passed the estate to the grantee; and that the lands conveyed were, in his hands, subject to his creditors.

The chancellor adopts the reasoning of the majority of the Court of Errors in *Connecticut*, in *Preston v. Crofut*. (1 *Conn. Rep.* 527. note.) That case was very ably discussed by those who maintained different opinions; and, it is manifest, that it was decided on the peculiar structure of the statute, which was taken from the 13th of *Eliz.* of that state, without the proviso. The counsel who argued for the party who had judgment, expressly admit, that had the proviso to the 13th *Eliz.* been annexed to their statute, it would have precluded all controversy on the subject; and the same counsel admit, that a sale on good consideration, with intent to defraud creditors, to one who is ignorant of the intent, is valid, under their statute; although such a case is embraced in the general words of the proviso, in the 13th of *Eliz.*, though for that only, the proviso would have been unnecessary. The reason, (they argued) of providing for a subsequent purchaser, must have resulted from the very construction of the enacting clause for which they contend, and the same construction would render any proviso for the immediate vendee of the debtor unnecessary. In the latter case, the vendee takes from one who has a title to convey: In the former, the title of the subsequent *bona fide* purchaser being intercepted by the enacting clause, a proviso is necessary to give efficacy to the deed. My opinion, in *Sands v. Hildreth*, (14 *Johns. Rep.* 499.) has been referred to, to show that I considered a deed given by a debtor, with a view to defraud his creditors, to a *bona fide* purchaser, as protected by the 6th section of our statute. I agree with the counsel

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whose arguments I have quoted, that the expressions of the proviso were broad enough to embrace such a case; but I never was of the opinion, that the common law, or the statute of 13th of *Eliz.*, without the proviso, would have affected a deed, where, though the intention of the grantor was fraudulent, yet the grantee was a *bona fide* purchaser for valuable consideration. That case did not call for the expression of an opinion upon such a case as the present. The terms of the proviso are broad and extensive: they apply to any conveyance, whether from the fraudulent grantor, or fraudulent grantee. It meant to protect a *bona fide* purchaser for valuable consideration, without notice of the fraud, from the operation of the statute. This, it appears to me, is manifest, as well from the internal evidence of the proviso, as from the plainest maxims of equity and justice. By the proviso, the act, or any thing contained in it, shall not extend, or be construed to impeach, defeat, &c. *any conveyance* of any lands, made upon good consideration and *bona fide*, to any person, not having, at the time of such conveyance to him made, any manner of notice or knowledge of such covin, fraud, or collusion, as is aforesaid. The enacting clause had pronounced as fraudulent and void, those conveyances only which are devised and continued, of malice, fraud, covin, collusion, or guile, to delay, hinder, *or defraud creditors, &c.; and, most certainly, it contemplated two parties to the collusion and fraud, the grantor and the grantee. The words in the proviso, *notice or knowledge of such covin, fraud, and collusion*, are not applicable to the original parties, but embrace subsequent purchasers only. Again, the proviso is general; it exempts *any conveyance* upon good consideration, and *bona fide*, to any person, not having notice of the fraud or collusion, from the effects of the enacting clause. And why should not its benefits be extended to any *bona fide* purchaser, for valuable consideration, whether he purchases from the fraudulent grantor or the fraudulent grantee? I trust it has sufficiently appeared, that the fraudulent grantee takes the entire interest of the fraudulent grantor; and that the deed is voidable, at the instance of the creditor, not legally and strictly void. The general principle why a *bona fide* purchaser, for valuable consideration, ignorant of the covin, is secure in his purchase, is well illustrated by Chief Justice *Marshall*, in *Fletcher v. Peck*, (6 *Cranch*, 133.) He says, "if a suit be brought to set aside a conveyance obtained by fraud, and the fraud be clearly proved, the conveyance will be set aside as between the parties; but the rights of third persons, who are purchasers without notice for a valuable consideration, cannot be disregarded. Titles, which according to every legal test, are perfect, are acquired with the confidence which is inspired by the opinion, that the purchaser is safe. If there be any concealed defect arising from the conduct of those who had held the property long before he

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acquired it, of which he had no notice, that concealed defect cannot be set up against him. He has paid his money for a title good at law; he is innocent, whatever may be the guilt of others, and equity will not subject him to the penalties attached to that guilt. All titles would be insecure, and the intercourse between man and man would be very seriously obstructed, if this principle be overturned."

Where the reason is the same, the law must be the same. It is in vain that we search for any difference between a conveyance by a fraudulent grantee, where the intention was to deceive subsequent purchasers, and a conveyance by a fraudulent grantor, where the intention was to defraud present or future creditors. Some distinctions have been attempted, but they strike me as too refined and subtle for practical use. The ground adopted by the courts, for protecting *bona fide* purchasers, without notice, is solid and substantial, and applies, with equal force, to both descriptions of grantees. In *Prodger v. Langham*, (1 *Sid.* 133.) it is stated, "for although the estate of the first feoffor was, in its creation, covinous, and so void, against a purchaser for valuable consideration from the first feoffor, that feoffment shall be preferred to a subsequent feoffment from the first feoffor." The same principle was adopted in *Andrew Newport's case*. (2 *Skinner*, 423.) *Roberts*, (*Fraud. Con.* 497.) after citing those cases, says, "the valuable consideration, whenever it occurs, entirely obliterates the fraud, so that it can never again, in any shape, affect the transaction." The principle is, that although a deed be fraudulent in its creation, yet by subsequent matter, it may acquire validity, in favor of a purchaser, for valuable consideration. And where two persons have equal equities, the maxim applies, *qui prior est in tempore potior est in jure*. It was pertinently observed by the counsel in *Preston v. Crofut*, "whether the exposure of purchasers to the loss of property fairly bought of a fraudulent vendor, was a greater evil, than for ever to deprive the creditor of his claim, after a *bona fide* sale, was a question proper for the consideration of the legislature." In my judgment, they have decided it in favor of the purchaser from a fraudulent vendee. I must be understood, as qualifying the right of the purchaser from the fraudulent vendee. It must be prior, in point of time, to a sale for a valuable consideration, by the fraudulent grantor; and it must, also, be prior to a sale on execution, at the suit of the creditor. Although, in *Jackson v. Tracy*, the sale under the judgment was prior to the deed from the fraudulent grantee, yet, in that case, the registry of the latter deed first took place, and the transaction happened in a county where deeds are required to be registered.

In the present case, *S. Johnson* gave a mortgage to *Daniel Stansbury* on the 28th of *March*, 1808, on the premises, *to secure the payment of 330 dollars and 89 cents; and this mortgage was prior to *Taylor's* judgment. under which the

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respondents claim; and it stands uninfected with notice, or the want of consideration. *IN ERROR.*

One of the objects of the bill was to be relieved from the effect of the judgment in ejectment obtained by the appellants against *M'Leod*. The facts are, that the appellants brought an ejectment against him; he alone appeared and defended. The cause was tried, and a verdict and judgment passed against him. The respondents insist, that *M'Leod* was their tenant, prior to his becoming a tenant to the appellants, and that if he attorned to them, the attornment was void; that their possession has not been changed; and that the appellants ought not to be permitted to proceed to change the possession, under their judgment, and thereby put the respondents to the necessity of bringing an action at law to recover possession. The appellants deny any knowledge of any agreement between the respondents and *M'Leod*, for leasing the premises, and they state and rely upon the trial and judgment.

The chancellor, in the first instance, granted an injunction, staying all proceedings on the judgment in ejectment; and the final decree renders the injunction perpetual. The objections are, that *M'Leod* is not made a party to this suit; and had he been a party, the decree would, nevertheless, be erroneous.

It is an undoubted principle, that a court of equity will not relieve, where the bill is in the nature of a bill for a new trial, in a court of law. After a verdict, a bill of discovery does not lie in support of a fresh action. Thus, when a plaintiff, not being able to prove a letter written by him to the defendant, filed a bill of discovery, to clear up the matter, the defendant pleaded the verdict, and demurred for want of equity, the plea and demurrer were allowed. (*Ch. Cases*, 65. 8 *Viner*, 542.) Where money was paid in part, for goods sold, and the receipts were lost, and the whole was recovered at law, a bill of discovery was then filed, and Lord Keeper *North* said, "you come too late for a discovery after verdict." But this question underwent a very full and solemn examination in this court, in *Simpson v. Hart*, (14 *Johns. Rep.* 63.) and in the Court of Chancery. (1 *Johns. Ch.* 91.) It was clearly held, in that case, that where courts of law and equity have concurrent jurisdiction over a question, and it receives a decision at law, equity can no more re-examine it, than the court of law, in a similar case, can re-examine a decree in the court of equity. The case of *Bateman v. Willoe*, (1 *Sch. and Lef.* 201.) was referred to with approbation. In that case, a verdict was obtained at law, which the plaintiff considered unjust, and having failed in his application for a new trial, he sought relief in equity, but the bill was dismissed. Lord Chancellor *Redesdale* said, he could not find any ground whatever for a court of equity to interfere, because a party had not brought evidence which was in his power, at the time, or be-

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cause he had neglected to apply, in due time, for a new trial. He observed, that there were cases where a verdict has been obtained by fraud, or where a party has possessed himself improperly of something, by means of which he has an unconscientious advantage at law, which equity will either put out of the way, or restrain him from using; but, without circumstances of that kind, he did not know that equity ever does interfere to grant a new trial of a matter which has been discussed in a court of law; a matter capable of being discussed there, and over which the court of law had full jurisdiction. In *Simpson and Hart*, the chancellor said, it was the settled doctrine of the *English* Chancery, not to relieve against a judgment at law, on the ground of its being contrary to equity, unless the defendant below was ignorant of the fact in question, pending the suit, or it could not be received as a defence. It is true, that the decree in that case was reversed; but the principles were admitted to be sound, though they were considered inapplicable to the facts of that case.

The respondents must be considered either as strangers to the ejectment suit, or as having defended the same in the name of *M Leod*. In the first case, the subject matter of that suit was *res inter alios acta*; and it never can be allowed to them to overhaul or draw that trial in question. They are mere intruders into that controversy, and have no right to impeach the proceedings. In the second case, if *having had notice of the ejectment, instead of making themselves defendants, as they might have done, if they were the real landlords, they have chosen to defend the suit in *M Leod's* name, they have waived their right to question the proceedings in this manner. But their rights at law were not concluded in an independent suit. The Supreme Court, in denying the motion for a new trial, (12 *Johns. Rep.* 183.) expressly said, that although *M Leod*, after having been proved to be a tenant to the appellants, could not set up a tenancy under *Roberts*, and was bound to restore them the possession; yet, that the rights and claims of others to the premises could be tried after the possession had been given up.

There existed, then, no impediment to the respondents bringing their action at law; and I must consider it a novel doctrine, not to be sanctioned, that a court of equity will take cognizance of questions purely of a legal nature, and within the acknowledged jurisdiction of a court of law. I wish not to be understood, as insinuating, that the Court of Chancery, on the present occasion, has intentionally invaded the jurisdiction of the common law courts. I am sure it would not do so; yet, I cannot avoid considering the entertaining this bill, as such encroachment. The appellants have not precluded themselves from making the objection. They have insisted in the answer, on the trial and verdict at law, as precluding the respondents. By the judgment at law, the appellants have

acquired a right to recover possession of *MLeod*, and, also, to recover their *mesne* profits and costs; of this right, the decree deprives them in part.

The principle, that a court of equity will give relief in cases of fraud, is undoubted. It is a principal object of equity jurisdiction; but, on the principles I have advanced, in considering the first point, a court of equity ought not to decree against a *bona fide* purchaser for valuable consideration, without notice though his title be derived from a conveyance intended to defraud creditors. The appellants have answered, under oath, that they are such purchasers, and, consequently, they are within the protection of the proviso to the statute.

*I am for reversing the decree, and dismissing the respondents' bill, on both grounds: 1. That the respondents have made out no case for relief in equity; and 2. That the appellants have established their title to protection, in their purchase of the *Stansbury* mortgage.

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PLATT, J. (After stating the evidence.) From this evidence it appears, that *Benjamin S. Anderson* has a regular title under the judgment of *Clason* against *Sarah Johnson*; the deeds to her being *prior* to the judgment of *Taylor* against *Griffith*, under which the respondents claim. But it is insisted, on the part of the respondents, that the conveyances from *Griffith* to *Mrs. Johnson*, were made to defraud the creditors of *Griffith*, and are, therefore, void as against the respondents. The evidence is abundantly sufficient to prove, that the two deeds from *Griffith* to *Sarah Johnson*, were made to defraud his creditors; and that *she conspired* with him for that purpose. And I think the proof so clear and irresistible on that point, that it is immaterial whether the affidavits of *Sarah Johnson* and *Thomas Allen*, be admitted or not. My opinion, however, is, that those affidavits were properly excluded, for the reasons assigned by the chancellor.

It is, then, contended, on the part of the appellants, that even admitting the deeds to *Sarah Johnson* were fraudulent, yet, that *Benjamin S. Anderson* became a *bona fide* purchaser of her title, at sheriff's sale, for a valuable consideration, without notice of any such fraud; and that the title under her was purged of the fraud, by means of such subsequent *bona fide* purchase. By the first section of the statute "for the prevention of frauds," it is enacted, that all grants, bargains, and conveyances of land, made to delay, hinder, or defraud creditors, shall, as against such creditors, be deemed "clearly and utterly void, frustrate, and of none effect." And the 6th section of the statute contains a proviso, that this act "shall not extend, or be construed to impeach, defeat, make void, or frustrate, any conveyance or grant of lands, for good consideration, and *bona fide*, to any person not having, at the time, any manner of notice or knowledge of such fraud." The

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original fraud being *proved, it is incumbent on the appellants, according to every construction of the statute, to bring their case strictly within the proviso. In my judgment, they have not done so. *Benjamin S. Anderson* bid 150 dollars, at the sheriff's sale, on the execution against *Sarah Johnson*; and the premises (worth 1,500 dollars) were struck off to him. He received the sheriff's deed, in usual form, for all the right and title of *Sarah Johnson* in the premises, without any specification of the nature or quantity of her estate. The terms of such sales always imply the caution of *caveat emptor*, so far as to impose on the purchaser the duty of strict inquiry, and afford little ground for him to complain of being deceived. If *Sarah Johnson* had been in the actual possession under such deed; or, perhaps, if the possession had been vacant, a *bona fide* purchaser at a sheriff's sale, might be deemed within the proviso of the statute. But in this case, *Sarah Johnson* had neither the actual, nor the constructive possession of the premises. The proof is clear and uncontradicted, that soon after the pretended conveyance from *Griffith* to her, *Griffith*, in his own right, executed to *Alexander Denniston* a lease of the premises, for five years, at an annual rent of 110 dollars. *Denniston* took possession, and held distinctly, as the tenant of *Griffith* under that lease, at the time of the purchase by *Anderson*. It is proved, that *Sarah Johnson*, at no time, ever had the possession in person, or by her tenant; nor did she ever receive rent, or any other acknowledgment of her title. On the contrary, it appears, by the testimony of *Denniston*, that he refused to acknowledge her title, or to pay rent to her; and that, in fact, he held adversely to her claim. It is very clear, that if her title had been good, she could not have made a valid conveyance to any person, except the tenant in possession, or to *Griffith*, on account of the adverse possession. Now, when we take into consideration, that the premises were advertised by the sheriff; that the lands so advertised were then in the actual possession of a tenant holding in opposition to, and in defiance of, *Sarah Johnson*, and who so held at the date of *Clason's* judgment against her, and down to the time of the sheriff's sale, and when it is considered, that the sale was at *Newburgh*, within *a few rods of the house and lot in question, such adverse possession must be deemed *constructive notice* to *Anderson*, the purchaser, that her title was defective. It was enough to put him on inquiry, and that is equivalent to notice. This principle has been settled under the construction of the statutes for the recording and registry of deeds and mortgages, and in other analogous cases. *Anderson* does not, therefore, appear in the character of a *confiding* and *deceived* purchaser, who paid his money for an *ostensible* equivalent; but he stands in the light of a speculating adventurer, for a nominal consideration, and has no just claim to any thing more than *Sarah Johnson* herself could have legally claimed in the

premises. I think he is not, in the language and sense of the proviso, "a purchaser for good consideration, *bona fide*, without any manner of notice," &c. IN ERROR.

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In my view of this case, it does not become necessary to decide the important question, whether a *bona fide* purchaser, for good consideration, without notice, &c. can acquire a valid title, as against creditors, by a conveyance from a fraudulent grantee of the defrauding debtor. That question is, however, fairly before us; the chancellor has pronounced a deliberate opinion on it; and as the point is highly important to the community, I think the occasion requires, that the construction of the statute should now be settled, by the solemn decision of this court. With profound respect, I have read the case of *Preston v. Crofut*, in the Supreme Court of Errors of Connecticut, (1 *Day's Rep. N. S.* 527. note,) where the subject has been concisely exhausted by the counsel and the court. But, after the best consideration of which I am capable, my mind has been led to the conclusion, that his honor the chancellor has not given the true exposition of the statute; and that such a *bona fide* purchaser, under a fraudulent grantee, without notice, either actual or constructive, acquires a valid title, purged of the original fraud, as against creditors. The enacting clause, and the proviso, taken in connection, certainly do not, *ex vi terminorum*, necessarily require a construction which would defeat such a *bona fide* purchase. On the contrary, the words of the proviso seem large enough to save the rights of such a purchaser, according to their grammatical *sense and ordinary acceptation. In the eye of the legislature, and in the view of sound policy, it seems to have been an object of as much solicitude to protect *honest purchasers*, as *honest creditors*. A purchaser who pays a fair price, for an ostensibly fair title, without notice, or ground for suspicion of any *latent fraud* in any previous link of the title, has, in my judgment, *higher equity* than an adventurous creditor, who trusts, without any *lien* on the debtor's land. He who *trusts* most, should *risk* most. The creditor *may* protect himself by exacting security, but the purchaser *cannot* guard against the future claims of unknown dormant creditors. It is better that such sleeping creditors should sometimes lose their money, than that titles to lands should be rendered precarious and insecure. I think it better accords with the letter and spirit of the statute, to say, that a *general creditor* must assert his claim before the fraudulent grantee of his debtor has deceived an honest purchaser, or that such creditor shall lose his right. A contrary doctrine would often enable a creditor to "convert his shield into a sword."

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Our statute comprises the statutes of 13 *Eliz.* ch. 5. and 27 *Eliz.* ch. 4. without any essential variation; and this question arises upon the construction of the 1st section of our act, and the proviso in the 6th section, which, together, comprise the statute of 13 *Eliz.* ch. 5.

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It was remarked by Lord *Mansfield*, in *Cadogan v. Kennett*, (*Cowp.* 434.) "that the principles and rules of the common law, as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every end proposed by the statutes of 13 *Eliz.* ch. 5. and 27 *Eliz.* ch. 4. The former of these statutes relates to *creditors* only; the latter to *purchasers*. These statutes cannot receive too liberal a construction, or be too much extended, in suppression of fraud. The statute of 13 *Eliz.* ch. 5. directs, 'that no act whatever, done to defraud a creditor, shall be of any effect against such creditor.' But, then, such a construction is not to be made in support of creditors, as will make third persons sufferers. Therefore, the statute does not militate against *any transaction *bona fide*, and where there is no imagination of fraud. And so is the common law."

If the statute is a mere declaration or developement of the principles of the *common law*, my construction is perfectly reconcilable with the decision of the Court of Errors of *Connecticut*, in *Preston v. Crofut*. The common law, the statute of 13 *Eliz.* ch. 5. and our statute for the prevention of frauds, all agree in the rule (according to my apprehension) that a conveyance, in which the grantor and grantee conspire to defraud creditors, is void as against creditors; *provided*, however, that this rule shall not extend to defeat the title of *any bona fide* purchaser, for good consideration, without notice of the fraud. Now, the statute of *Connecticut*, on which that decision was founded, contains *no such proviso*; and by such omission, the legislature of that state have chosen to alter and modify the rule of the common law, so as to make no saving or exception in favor of subsequent *bona fide* purchasers. I understand all the judges, in *Preston v. Crofut*, to agree, that under their statute, without such proviso, the first *grantee*, as well as the *grantor*, must participate in the fraud, in order to render the deed void as to creditors. Now, if that be the true exposition of the statute, I ask, Of what use or effect is the proviso, unless it be construed to extend to *subsequent purchasers*? If it was unnecessary, in order to protect the *first bona fide* grantee, under a fraudulent debtor, and is not to be extended to a subsequent purchaser; then it follows, that the proviso in our statute is to be rejected as surplusage. In my judgment, the 6th section of our act, containing the proviso of 13 *Eliz.* ch. 5. was designed not merely to *explain*, but to *limit* and *qualify* the first section; and I do not feel authorized to reject it as inoperative.

The universal silence in *Westminster Hall*, upon the precise point now under discussion, affords to my mind strong ground to infer, that the construction contended for by the respondents, was never sanctioned by the courts in *England*. If such had been the doctrine in that country, the cases demanding an application of it, must have been of very frequent occurrence; and yet, we find no case, where *a creditor in *England* ever

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attempted to impeach a conveyance on the ground of fraud, except where the purchaser, whose title was sought to be defeated, was either a party to, or was presumed conusant of such fraud. *IN ERROR.*

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With great respect, therefore, I am satisfied, that the construction adopted by the chancellor, is contrary to the policy and spirit of the statute "for the prevention of frauds." And that construction appears to be much more unsafe and inconvenient in this country, than in *England*; when we consider, that the transfer of titles to lands, is with us *necessarily frequent*, beyond all example in other countries. Vast quantities of our surplus lands, without occupants, are daily offered *for sale* in the market; and sound policy forbids, that we should recognize or sanction the principle of a *latent disease*, which reasonable care cannot perceive nor guard against, and which may, at some indefinite time, taint and destroy these titles.

I feel a decided conviction, that the construction given by his honor the chancellor, to the statute of frauds, is contrary to the general opinion, and common understanding in this community. It would, *practically*, introduce a *new* and *important* rule of property, with a retrospective effect; and I dread the evils that might flow from the experiment. It would, undoubtedly, in many cases, bar an inlet to fraud, and operate to protect honest creditors; but I fear that, in its general application, it would enable "*prowling assignees*" of creditors, to prey upon unsuspecting honest purchasers, who would be ruined, not for any important benefit to creditors, but to enrich a host of *mousing speculators*.

The exception to the jurisdiction of the Court of Chancery is, I think, without foundation; and the authorities cited for the appellants on that point, have been totally misapplied, on the argument. To sift and scrutinize frauds, by a bill of discovery, and to set aside and annul fraudulent conveyances, so that they may not be set up at law after the evidence of the fraud may be lost, is, emphatically, within the appropriate jurisdiction of a court of equity. A court of law can neither compel a discovery, nor set aside a fraudulent deed. And even if the fraud could now be *proved in an action of ejectment, so as to defeat the fraudulent conveyance, a judgment in ejectment would be no bar to another suit, in which it might hereafter be impossible to prove the fraud. The future security of the true title, therefore, demands, that the formal evidence of the *corrupt* title should be destroyed, or that the party should be restrained from using it; and a perpetual injunction is the proper means for that purpose.

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The decree awards an injunction against suing out a *habere facias possessionem* in the ejectment suit of *Anderson v. H. M'Leod*. It is said, that that was a proceeding *inter alios acta*; and, therefore, not a subject for decree between these parties. In my judgment, that objection is unfounded. Part of the *gra-*

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vamen of the plaintiffs was, that the *Andersons*, in order to fortify their spurious title, had tortiously procured an attornment to them from *M'Leod*, who was, in fact, a tenant under the plaintiffs; (holding under a lease for a year, now expired;) and that by virtue of that attornment, which *M'Leod* could not question, the *Andersons* had recovered judgment against him, whereby the plaintiffs were in danger of losing their possession, or having it changed without their consent. This was against equity, and why not enjoin against their taking possession? Why, *unnecessarily*, put the plaintiffs to an ejectment suit against the *Andersons*, in which their right to recover would be certain and inevitable?

I am, also, of opinion, that it was not necessary to make *Hector M'Leod* a party to this suit. The evidence clearly shows, that he occupied the premises under a written lease from the respondent *Robert Roberts*, for a year; and that while so in possession, as the tenant of *Roberts*, *B. S. Anderson* induced him to make a fraudulent attornment to him. That attornment was a void act as regards the respondents, and *Hector M'Leod* has no rights in hostility to them. Although he may, by his own folly, have rendered himself liable to the costs of the ejectment suit of the *Andersons* against him, the decree does not touch that claim for costs. *M'Leod's* interest as lessee, whether he be considered the tenant of the appellants, or of the respondents, had expired long before this suit.

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*The answer of the appellants avers, that after *Benjamin S. Anderson* had purchased the premises at the sheriff's sale, the appellants, for a valuable consideration, procured an assignment to them of a mortgage which had been executed by *Sarah Johnson* to one *Daniel Stansbury*, bearing date the 28th of *March*, 1808; and also, that the appellants, for valuable considerations, obtained releases, or quit-claim deeds, from *Sarah Johnson*, and from *William* and *Nancy King*, in *March*, 1810, for these premises. But these are substantive allegations, which were denied by the general replication, and were not proved, nor offered to be proved. I, therefore, take no notice of those allegations in the answer.

Upon the whole case, my conclusion is, that the appellants have failed to prove that *Benjamin S. Anderson* is a *bona fide* purchaser, without notice of the fraud; and, on that ground, the decree ought to be *affirmed*.

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The rest of the court concurred in the opinion delivered by his honor the *chief justice*; and it was thereupon ORDERED, ADJUDGED, and DECREED, that the decree and orders of his honor the chancellor, complained of, in this cause, be reversed; and that the respondents' bill be dismissed, and that the injunction thereupon ordered, be dissolved; and that the respondents, *Robert Roberts* and *Samuel Boyd*, pay to the appellants their costs to be taxed, and that the record and 414

proceedings be remitted to the Court of Chancery, to the end that this decree may be carried into execution. *IN ERROR.*

Decree of reversal.

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*JOHN K. BECKMAN, appellant,
against

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JOSIAH FROST, ELI GODDARD, PHILO GODDARD, and
JESSE KELLOGG, respondents.

APPEAL from the Court of Chancery. In *April*, 1808, the respondents filed their bill against the appellant, which stated, in substance, that *Frost*, one of the plaintiffs, and *Martin Goddard*, then deceased, in *August*, 1803, agreed to purchase of *Henry Corl*, jun., lot No. 33. in the town of *Marcellus*, containing 600 acres; that, on the 19th of *September*, 1803, *Corl* conveyed 200 acres, part of the lot, to *Frost*, for which *Frost* paid him, in *August*, 1803, 300 dollars, and, on receiving the deed, 700 dollars more; that *Corl*, in *September*, 1805, pursuant to the agreement, conveyed half of the residue of the lot to *Frost*, and half to *Martin Goddard*, and the deeds were duly recorded the 15th of *September*, 1807. On receiving the last mentioned deeds, *Frost* and *Martin Goddard* gave their promissory notes to *Corl*, for the purchase money, and which notes *Corl* assigned to others. In *September*, 1807, *Frost* sold the 200 acres of land, first conveyed to him, to *Jesse Kellogg*, one of the plaintiffs; and *Martin Goddard* sold and conveyed his interest in the lot to *Eli Goddard* and *Philo Goddard*, two of the plaintiffs. That the plaintiffs discovered on the records, in the office of the clerk of the county of *Onondaga*, a mortgage from *Corl* to *John K. Beekman*, the defendant, dated *May* 6th, 1803, registered the 9th of *September*, 1805, to *secure the sum of 300 dollars, payable on the 6th of *May*, 1808, with interest; on discovery of which mortgage, *Frost* applied to the defendant, and offered to pay the sum of 300 dollars, and interest, which was refused; and, to the surprise of *Frost*, the defendant stated that the mortgage, in fact, was to secure the sum of 3,000 dollars, and which sum he demanded, saying there was a mistake in the registry as to the sum. That *Frost* had no knowledge or suspicion of the mortgage, at the time of the delivery of either of the deeds from *Corl* to him; nor had, as he believed, *Martin Goddard* any knowledge of it, at the time of the delivery of the deed to him; and that *Frost* and *Martin Goddard* have sold and conveyed the lands as aforesaid, without any knowledge or suspicion of any other mortgage, than one for 300 dollars. That the interest of the plaintiffs ought not, therefore, to be affected by the mortgage, beyond the sum of

An objection not made by the party in the court below, cannot be made in this court. Nor can a point or question, which, had it been raised in the court below, might have been met and obviated, be raised here for the first time. *Aliter*, if the point raised here, could not, by amendment or proof, have been obviated in the court below. (a)

It is essential to a bill to redeem a mortgage, that the plaintiff should offer to pay the debt, interest, and costs.

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That the plaintiff is a *bona fide* purchaser, for a valuable consideration without notice, is not ground for relief, though it is a good defence in equity. As, where there was a mortgage given to secure a debt of 3,000 dollars, which was registered as *fc.*

(a) Vide *Bank of Utica v. Smedes*, 3 Cowen's Rep 684.

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a debt of 300 dollars only, and the plaintiff, who was a *bona fide* purchaser, without notice, filed his bill to be relieved against the mortgage, beyond the sum expressed in the registry, and to stay the mortgagee from proceeding to sell the land, under a power contained in the mortgage, &c. Held, that this was not a bill to redeem, and [* 546]

that the plaintiff could not sustain the bill for relief, though he might set up the facts as ground of defence.

The registry of a mortgage, given to secure 3,000 dollars, but, by mistake, registered for 300 dollars, is notice to a subsequent *bona fide* purchaser, to the extent only of the sum expressed in the registry.

Where a deed was deposited by the grantor with W., as an *escrow*, to be delivered to the grantee, on his producing a mortgage executed and recorded, and a certificate of the clerk of there being no other incumbrance on record: And W., on receiving the mortgage and

300 dollars expressed in the registry; that valuable improvements have been made on the lot, since the purchase from *Corl*, that the defendant is advertising the lot for sale under the mortgage, for the purpose of raising the sum of 3,000 dollars, &c. The plaintiffs prayed an *injunction* to stay all further proceedings on the part of the defendant, &c.

The answer of the defendant stated, that, in May, 1803, he had a good title to the lot in question, which he agreed to sell on the 6th of May, 1803, to *Corl*, for 3,000 dollars, payable on the 6th of May, 1808, with interest. The agreement was by parol; but the defendant promised to execute a deed, and send it to *R. Westerlo*, of *Albany*, as an *escrow*, to be delivered to *Corl* when he should produce to *Westerlo* a mortgage of the lot, to secure the purchase money, duly executed by him and his wife, and registered according to law, and a certificate of the clerk that there was no other mortgage on the lot registered. That the defendant, accordingly, on or about the 6th of May, 1803, signed and sealed a deed for the lot, to *Corl*, who, at the same time, drew a mortgage to be executed by *Corl* and wife, which was approved of by the defendant; and the defendant deposited his deed with *Westerlo*, as an *escrow*, to be delivered to *Corl*, on his producing the mortgage and certificate as aforesaid. *That, in September, 1805, as the defendant was informed by *Westerlo*, *Corl* produced, and delivered to *Westerlo*, a certificate of the clerk of *Onondaga*, dated September 9th, 1805, that there was no mortgage of the premises registered in his office, and that *Corl* had left in his office, that day, a mortgage executed by him and his wife, to *Beckman*, for the premises, to secure the payment of 3,000 dollars, &c. That, shortly after, *Corl* delivered to *Westerlo* the mortgage, for securing the sum of 3,000 dollars, dated the 6th of May, 1803, purporting to be executed by *Corl* and his wife, acknowledged by *Corl* the 7th of September, 1805, and registered the 9th of September, 1805; and that *Westerlo*, on receiving the mortgage and certificate, delivered up the deed of the defendant to *Corl*; but the defendant insisted that such delivery was not valid, because the conditions on which the deed was to be delivered, were not performed by *Corl*; and the mortgage, though purporting to be signed by the wife of *Corl*, had not been acknowledged by her. That *Corl* having absconded long before the day of payment, and no person appearing to satisfy the mortgage, the defendant caused the lot to be advertised for sale, under the power contained in the mortgage; that the defendant had no knowledge of the facts stated in the bill; that, in September, 1807, he first discovered that the clerk, in registering the mortgage, had inserted 300, instead of 3,000, dollars; and he charged, that the plaintiffs purchased without any reference to the registry; and that he hoped to prove that the plaintiffs and *Martin Goddard* had previous notice of the mortgage, &c.

The defendant admitted that improvements had been made on the lot, but to what extent or value he was ignorant. *IN ERROR*

It was proved, on the part of the plaintiff, that *Corl* absconded in the summer or autumn of 1803, and that his wife died in *July* or *August*, 1806. The sale of the lot to *Frost* and *Martin Goddard*, by *Corl*, as stated in the bill, was proved. One of the witnesses, *Samuel Whitney*, stated that, in *September*, 1807, he discovered the mortgage of the defendant on record, and communicated the fact to the sons of *M. Goddard*, which, he believed, was the first notice *Frost* *or *Goddard* had of it. Two other witnesses, *Russel Taylor* and *Nathan Healy*, stated, that the deeds from *Corl* to *Frost* and *Goddard*, were given in *September*, 1806, when the articles of agreement for the same land were given up to *Corl*. *Frost* gave two notes, of 420 dollars each, to *Corl*, who had given a receipt for 130 dollars, paid before; and in *February*, 1806, *Corl* received 140 dollars.

Rufus Lawrence stated, that he paid *Corl*, for *Martin Goddard*, at two different times, 460 dollars, and *Goddard* also gave *Corl* a note for 300 dollars. The notes of *Frost* and *Goddard*, to the amount of 700 dollars, were, afterwards, seen in the hands of *Matthew Trotter*, to whom they had been assigned, and who gave them up to *Frost* and *Martin Goddard*, and took new notes, payable to himself, for the same amount. It appeared that the deed from *Corl* to *Frost*, for 200 acres, was dated *September* 19, 1803, for the consideration of 1,000 dollars, acknowledged the 11th of *April*, 1805, and recorded *July* 3, 1805; and the deed for 207 1-2 acres, from *Corl* to *Frost*, was dated *September* 1, 1805, acknowledged the 13th of *September*, 1806, and the 15th of *September*, 1807, for the consideration of 1,000 dollars; and the deed to *Martin Goddard* was acknowledged and recorded at the same time. The deed from *Frost* to *Kellogg*, of 200 acres, for the consideration of 2,000 dollars, was dated the 21st of *September*, 1807, and acknowledged and recorded on the same day. There was also a deed from *Kellogg* to *Frost*, dated the 6th of *July*, 1808, for 200 acres. for the consideration of 2,000 dollars, acknowledged on the 7th of *July*, 1808, and recorded the 13th of *May*, 1809. The deed from *Martin Goddard* to *Philo Goddard*, was dated the 24th of *November*, 1807, for 50 acres, for the consideration of 400 dollars, but was not recorded; and the deed from *Martin Goddard* to *Eli Goddard*, was for 100 acres, dated also the 24th of *November*, 1807, for the consideration of 700 dollars.

It appeared, also, from the exhibits. that the deed from *Beekman* to *Corl* was dated the 5th of *May*, 1803, acknowledged the 11th of *December*, 1804, and recorded the 15th of *September*, 1806; and that the mortgage from *Corl* to *Beekman* was dated the 6th of *May*, 1803, acknowledged *the 7th of *September*, 1805, and recorded the 9th of *September*, 1805.

It was proved that valuable improvements had been made

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the certificate of registry by the clerk, &c. de-
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livered the deed to the grantee; and the mortgage to the grantor: Held, that the condition was performed, and the deed well delivered to the grantee; and that it related back, so as to give effect to an intermediate conveyance by the grantee to C., although the clerk made a mistake in the registry of the mortgage, as to the amount of the debt.

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by the plaintiffs, on the land. One witness stated the value of them to be 2,891 dollars.

Westerlo, who was a witness for the defendant, deposed, that in *October*, 1804, he received a letter from the defendant, dated the 26th of *September*, 1804, in which the defendant says he sends therewith the deed, bond, and mortgage of *Corl*, the first executed by the defendant, and to be delivered to *Corl*, provided he pays the balance, &c. and has the mortgage, *after executing it, put on record in Onondaga*, and brings the clerk's certificate that there was no mortgage or incumbrance thereon. That the witness delivered to *Corl* the deed, on his producing the mortgage and certificate, which was some time after the witness received the deed, but the exact time he could not recollect. That the certificate of the clerk was dated the 9th of *September*, 1805, and the certificate of the registry of the mortgage was of the same date; and the acknowledgment by *Corl*, of the mortgage, was on the 7th of *September*, 1805.

After a hearing of the cause, the chancellor, on the 3d of *October*, 1814, decreed as follows: "that it be referred to one of the masters of this court, residing in the county of *Onondaga*, to ascertain and report what sum or sums of money, were actually paid to *Henry Corl*, or to his endorsee or assignee, duly authorized to receive the same, by *Josiah Frost*, and *Martin Goddard*, respectively, before the first day of *October*, 1807, on any purchases mentioned in the pleadings in this cause, and made by them, or either of them, from him, prior to that date, of lands in lot No. 33, in the township of *Marcellus*; and that the master distinguish between such payments as were made for principal, and such payments as were made for interest. That he also ascertain, and report specially, whether any, and what part of the debts arising on such purchases, were transferred by *Henry Corl*, for a valuable consideration, and were discharged, in the hands of the *bona fide* holder, prior to that period, by *Josiah Frost* and *Martin Goddard*, or either of them, by new notes or obligations; or, if not discharged, of *which they had received notice from the assignee before that period. And the master is further directed to state an account of the moneys due on the respective purchases, for principal and interest, after deducting the payments which may have been made, and the parts of the debts discharged or assigned, with notice as aforesaid. And the master is further ordered and directed, to ascertain and report the amount of the principal and interest due on the mortgage given by *Henry Corl* to the defendant, according to the true sum mentioned in the mortgage, and, also, according to the sum mentioned in the registry thereof; and in taking the accounts aforesaid, the depositions and exhibits in the cause may be used by the parties; and they are to be at liberty to produce further proof, which the master is also to report; and all further questions are, in the mean time, reserved."

For the reasons of this decree, *vide* the opinion of the chancellor in the report of the same case, 1 *Johns. Ch. Rep.* 288. 296. 304.

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Van Buren, (A. G.) for the appellant. 1. Admitting all the facts stated in the respondents' bill, they have no right to relief in equity against the appellant. The registry of mortgages is solely for the purpose of securing priority, as to subsequent incumbrances. The registry is not necessary to give any validity to the mortgage itself. Suppose this mortgage had not been registered, and the mortgagee had proceeded to a foreclosure under the power of sale, could the chancellor have enjoined him from proceeding? A court of equity would interfere only on the ground of a mistake in the registry, or because the respondents are *bona fide* purchasers, without notice. But it was for the *appellant*, not the respondents, to ask relief on the ground of the mistake, since he is the person aggrieved. Can the respondents file a bill to take advantage of a mistake committed by the clerk, to the injury of the appellant?

2. Then, as to the other ground, this is the first attempt of a *bona fide* purchaser, in possession, to obtain relief against another. On a bill of discovery, if the defendant says, "I am a *bona fide* purchaser," and refuses to disclose his title, a court of equity will dismiss the bill, and leave the party *to seek his remedy at law. (1 *Madd. Ch.* 170, 171. 8 *Viner Ab. tit. Discovery*, 546. 2 *Madd. Ch.* 255. 2 *Vesey*, jun. 457.) "The title of a purchaser for a valuable consideration, is no ground for relief, though it is a good defence." (*Patterson v. Slaughter, Ambler*, 192.) A court of equity will not make a decree depriving a party of his right, on the mere allegation of the plaintiff. The plaintiff must prove that he is a *bona fide* purchaser without notice. Now, the evidence of *S. Whitney*, in answer to the sixth interrogatory, is merely an inference from circumstances, that the first notice which *Frost* and *Goddard* had of the mortgage, was in *September*, 1807. The chancellor has decreed, upon the mere allegations in the bill, because those allegations have not been disproved by the appellant. Where a *bona fide* purchaser in possession is attacked, he may state that fact as a defence in his answer under oath, and it will protect him. The respondents do not allege that *M. Goddard* had no information of the mortgage at the time *Carl* executed the deed to him. *Frost* says he had no notice, nor had *M. G.* notice, according to his, *Frost's*, knowledge and belief. But it may be objected, that this point was not raised at the hearing in the court below, and, therefore, cannot be urged here. But every point which, from the record, goes to the very foundation of the action, may be raised at any time. (*Palmer v. Lorillard*, 16 *Johns. Rep.* 353. *per Kent*, Ch. J.)

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3. Both parties being equally innocent, and having, therefore, equal equity, the bill ought to have been dismissed, and the parties left to their respective remedies at law. (1 *Fonbl. Equ. ch. 4. s. 25. ch. 5. s. 3.*) The respondents have adequate remedy at law. The only questions are as to the true construction of the registry act, and as to notice; these are questions peculiarly fit and proper for a court of law. But we contend that the appellant has the greater equity; his innocence is purer. The respondents made their purchase of C. before he had a legal title; and they ought, before they completed their purchase, to have examined the registry, which would have led to the discovery of the mistake. If the respondents had filed their bill to redeem the mortgage, on paying the 300 dollars, they might have insisted on the relief; but their bill *was not filed for that purpose. (*Birne v. Hartpole*, 5 *Bro. P. C.* 197. 2 *Madd. Ch.* 138.)

4. The conditions upon which the *escrow* was to take effect as a deed, not having been complied with, the title never passed out of the appellant. (4 *Com. Dig. Fait. A.* 3.) The conditions were, that C. was to pay the balance, as stated, and have the mortgage duly executed and put on record in the counties of *Onondaga* and *Seneca*, and bring the certificates of the clerks of those counties, and of *Cayuga*, that there was no other mortgage or incumbrance. Now the mortgage never has been duly recorded; that was an essential and a very important condition; for on that the appellant relied for his security as to the purchase money. If *Corl*, or the respondents, should file a bill for a specific performance of the contract, a court of equity could do justice to all parties. It cannot be said that the plaintiff waived this condition, for he did not know of the mistake, until after he had advertised the premises under the power of sale, in *September*, 1807.

5. The chancellor declares that the registry is good as to the 300 dollars; if so, the appellant was entitled to that sum, with interest, in addition to the sum of 1,264 dollars and 11 cents, ordered to be brought into court.

6. *Cole* and *Heely*, two of the respondents' witnesses, were interested, and therefore incompetent.

7. The decree, by restraining the appellant from proceeding, protects the property of persons who are not parties to the suit, and who have not applied for relief.

H. Bleecker and *Van Vechten*, contra. The first and second points were not raised at the hearing in the court below, and cannot, therefore, be urged here. This is the settled rule of the court. (13 *Johns. Rep.* 576. 14 *Johns. Rep.* 560. 2 *Sch. and Lefroy's Rep.* 712.) Nor does the observation of the chancellor, in *Palmer v. Lorillard*, at all weaken or vary this acknowledged and well established rule of a court of appeals. The appellant should have demurred to the bill.

(2 *Caines's Cases in Error*, 40. 56. *Cooper's Equ. Pl.* 117.) *IN ERROR.*
 To allow him to make the objection here, would be, in effect, ALBANY,
 permitting a demurrer in this court. (a) But what are these April, 1820.
 objections? The proceeding under the *power of sale, which
 is not known in England, (b) is equivalent to a bill and a
 decree of foreclosure. (*Jackson v. Henry*, 10 *Johns. Rep.*
 185.) When, therefore, the respondents found their lands
 advertised for sale, they could only offer to pay to the appellant
 the 300 dollars expressed in the registry; and when that was
 refused, their only remedy, to prevent the consequences of a
 sale, was to apply to a court of equity. They were, in effect,
 defendants against a proceeding on the part of the appellant
 to foreclose the mortgage, and which was equivalent to a bill
 for a foreclosure. The *answer* of the appellant puts the case
 on that ground, and obviates all the difficulty which has been
 raised. He charges that the respondents had notice of the
 true mortgage, and prays that they may account accordingly,
 and pay to him the amount due, or that their equity of redem-
 ption be foreclosed. The appellant thus puts himself on
 the jurisdiction of the Court of Chancery, as fully as if he had
 filed a bill against the respondents for a foreclosure.

Much has been said about notice. It is not usual for a bill
 to aver a want of notice. The fact comes out in the plea or
 answer. The appellant, in his answer, alleges that the re-
 spondents had notice, and the replication puts this allegation
 at issue; and it was for the appellant to prove the truth of his
 allegation. Again: it was, in effect, a bill to redeem, on
 paying what the respondents owed, or the 300 dollars, with
 interest. They do not, in precise words, pray for leave to
 redeem, but for relief according to their bill; and that must
 be on paying the 300 dollars with interest. (1 *Johns. Rep.*
 117. 559. 1 *Johns. Cases*, 431.) It is said that the respond-
 ents ought to have been dismissed, and sent to a court of law.
 But could a court of law ascertain what was due on the
 mortgage, or on what terms the respondents might redeem
 and keep possession? No matter, if the equity of the parties
 was equal. The Court of Chancery must mete out equity to
 the parties according to their legal rights, or under the statute.
 As to the hardship of the case on the part of the appellant; it
 is equally hard on *the respondents as innocent purchasers, if
 they must pay the 3,000 dollars, or lose their land; and the
 statute gives them the legal advantage arising from the defect-
 ive registry. Every case in which a person, having a second
 deed, procures its registry before the first is recorded, is equally
 hard.

3. *Corl* did perform the conditions, on which the deed was
 made an escrow; he delivered the mortgage to the clerk to be
 registered, and the clerk endorsed the usual certificate of the

(a) Vide *Henry v. Cuyler*, vol. 17. p. 469.

(b) Vide *Powell on Mortg.* 13, 14. *Croft v. Powell*, 2 *Comyn's Rep.* 603.

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registry. It was not the duty of *C.* to inspect the registry and compare it with the mortgage. The parties could intend no more than that *C.* was to produce to *W.* the ordinary evidence of the registry. *W.* was the agent of the appellant, and was satisfied; he delivered the deed to *C.*, and *B.* himself remained satisfied for years. He proceeded to sell under the power contained in the mortgage. Now, he could not take a single step under the mortgage, without recognizing the conveyance, and that the legal title had passed to *C.* the mortgagor. He has persevered to the last, in demanding payment of the mortgage. He is concluded by his own acts. It is a contradiction for him to say, that no title passed to *C.*, and yet insist on his rights under the mortgage. Besides, the deed took effect from its date, and the titles of all intermediate purchasers are protected by it. (*Jackson v. Bull*, 1 *Johns. Cases*, 81.)

4. The chancellor admits the mortgage to be good for 300 dollars; but it is a question whether the mortgage was good for any thing, until after a notice *in fact*. The act concerning mortgages (1 *N. R. L.* 372. *sess.* 36. *ch.* 32.) directs that the clerk shall enter in the register the names of the parties, the date of the mortgage, the *mortgage money*, the time when payable, the description of the land, &c. Now, a mortgage which is not so registered can have no effect at all against a *bona fide* purchaser. The registry in this case did not contain the mortgage money. The mortgage was not duly registered. The requisites of the act must be strictly complied with. If one omission or defect be overlooked, another may claim the same indulgence; and it is not easy to see where the mischief may end. It is a general complaint against courts of justice, that *they are too eager to help cases out of the operation of wholesome statutes. The appellant has his remedy against the clerk. Again; if the registry is not good, the respondents are not bound to pay the 300 dollars. If good, it must be by an equitable construction of the statute. If the appellant has equity, so have the respondents, who ought not to be charged with the payment of the 300 dollars, and the interest, without notice *in fact*. The registry was not *notice*, within the meaning of that word, as applied in a court of equity. (2 *Sch. & Lef.* 64. *per Lord Redesdale*.) It was not such a notice as should stop the respondents from paying the purchase money to *Corl.* (*Spencer, J.* 1 *Caines's Cases in Error*, 120. *Sugden's L. of V.* 469, 470.) Admitting, however, that the registry was notice, it was effectual no farther than to oblige them to retain the 300 dollars, with interest, which they have done.

5. If any of the witnesses were interested, the appellant should have taken the proper measures in the court below to prevent or suppress their testimony. Not having done so, the objection now comes too late. But they proved nothing material, except the payment of money by *Frost* to *Corl.*

6. The objection that the decree gives relief to persons not parties, is, in effect, an objection of the want of proper parties; and the plaintiff should have availed himself of it by demurrer or plea, or at the hearing in the court below. (*Cooper's Equ. Pl.* 185. 289.) If not insisted on there, it cannot be made, on appeal, in this court. (1 *Johns. Ch. Rep.* 437. 9 *Johns. Rep.* 591.) But these persons had no interest in opposing the decree; and if they had been made parties, it could have no effect to vary the decree.

The respondents stand before the court as *bona fide* purchasers, who are always entitled to the protection of a court of equity (*Sugden's L. of V.* 476. 496. 513. *Newland on Contracts*, 515. 2 *Vesey, Junr.* 454. 9 *Vesey*, 24.)

T. A. Emmet, in reply. 1 and 2. The first and second points, though not made in the court below, go to the whole merits of the case, and it would be against all principle to exclude the consideration of them. The rule is, that where *there is a clear case of equity against the party, and he raises in this court a new point, which, if it had been stated in the court below, might have been obviated, he shall be deemed to have waived it by his silence. In *Gelston v. Hoyt*, (13 *Johns. Rep.* 561.) and *Franklin v. Osgood*, (14 *Johns. Rep.* 527.) there were perfect grounds of relief, independent of the point newly raised in this court. (*James v. McKinnon*, 6 *Johns. Rep.* 543.)

This is not a bill to redeem. It is founded on a mistaken notion of being entitled to relief, as a *bona fide* purchaser, without notice; and the prayer is to stay the sale of the premises under the power. It is essential to a bill to redeem, that it should offer to pay the amount due to the mortgagee; and in that case, there is a final decision as to the rights of the parties. Here the decree is for a perpetual injunction, if the 300 dollars, with interest, is brought into court; otherwise the bill is dismissed. The prayer for general relief cannot go further. Though it may be resorted to, where the party has a decided equity, to protect him from injury, yet it is not used where the parties have equal equity. It is against the rules of pleading for the defendant to pray relief in his answer. If he has ground for relief, he should file a cross bill. Then, this bill stands merely on the equity arising out of the circumstance of the respondents being *bona fide* purchasers. Now, a case is not to be found of a bill filed for relief on that ground only. Being a *bona fide* purchaser, is not an equity, though it may rebut an equity. It is a shield, not a sword, as Lord *Eldon* observed. No notice, is a negative affirmation, not susceptible of proof. It is, however, good matter of defence, on the oath of the defendant, and if not contradicted by proof, it stands on his oath. But, the chancellor says, it is averred in the bill, and is not contradicted by the evidence. But it is unprecedented in chancery pleadings, that an

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Without repeating what fell from different members of this court in the cases referred to, all of which are reconcilable, the principle to be extracted from them I believe to be this: That no party shall be allowed to surprise or mislead *his adversary. Thus, if a party in the court below shall purposely suffer a decree or judgment to pass against him, by default, without contesting it there, he shall not be heard here; or, if counsel shall, for the first time, raise a point here, which might have been obviated, had it been made in the court below, he ought not to be permitted to do so.

In the case of *Gelston v. Hoyt*, this court refused to hear the demurrer argued here, because the counsel had purposely declined arguing it in the Supreme Court; and had thereby deprived the plaintiff below of a right which would have been granted to him; the right of having the pleading demurred to amended, if vicious, on payment of costs; a privilege this court could not grant. It would, in such a case, operate as a fraud, to lie by, and suffer judgment to pass by default, with the view of subsequently seizing on the same point in this court, and impose upon the party the accumulated costs of the whole action, if the pleading demurred to was bad. Such a course of proceeding would, also, defeat the provisions of the constitution, requiring the reasons of the decree or judgment to be made known to this court.

But where a cause has been defended in a court below, and comes here for review, and a point is made here which could not be obviated in the court below, by proof or amendment, I am clearly of opinion, that this court ought not to refuse cognizance of such point. (a) We may not, it is true, upon such point, have the reasons of the judgment in the court below; but this consideration cannot, and ought not, to preclude this court from entertaining such point. To those conversant with judicia

(a) Vide *Flower v. Allen*, 5 Cowen's Rep. 658.

discussions, it is well known, that the re-examination of a cause, before a court of *dernier resort*, is admirably calculated to elicit truth, and to detect any error, whether of the counsel or court, which may have taken place at an earlier discussion of the cause. Counsel not only come better prepared from the previous discussion, but all their faculties are put in requisition for the final and last hearing. A point decisive of the cause may have been overlooked by the counsel and the court; a point too, probably, growing out of the case, which no *evidence or amendment could alter or shake. Can it, then, consist with sound reason, or a sacred regard to individual justice, that this court should close its eyes, and refuse to see that which may decide a cause, because it had not been before observed? I think not. The cases of *James v. M'Kinnon*, *Lyon v. Tallmadge*, *Palmer v. Lorillard*, are strong authorities in support of my position; and they are not weakened by the other cases, if correctly understood. The case, too, of *Le Guen v. Gouverneur and Kemble*, (1 Johns. Cas. 436.) shows, that though this court expect to be informed of the reasons of the court below, it is not confined to those reasons. In that case, an appeal was made from an order directing a feigned issue. This court were of opinion, that such issue ought not to have been directed, but proceeded to hear the cause on its merits, and made a final decision. This procedure was justified by precedents in the house of lords. There, the chancellor had given no opinion on the merits; yet it was not considered an obstacle to the final hearing here. Upon the whole, I cannot doubt the right of this court, nor its duty, in hearing and deciding the first point now raised.

To the first point, whether the facts stated in the bill give the respondents a right to proceed in a court of equity, as plaintiffs, it has been answered, that the bill is, substantially, a bill to redeem, and that the facts set forth, and the case made out, are of equity jurisdiction, and entitle the respondents to the relief decreed.

It is certainly an essential part of a bill to redeem a mortgage, that it offer, in express terms, to pay the amount due, with costs. The bill usually states a prior tender of the money, and a refusal to accept it. It seems to me impossible to consider this as a bill to redeem the mortgage. Its frame and object were to obtain a decree setting aside the respondent's mortgage for any greater amount, than the sum for which it was erroneously registered. In terms, it does not pray a redemption of the mortgage, and it omits, what I consider an all important averment, the readiness to pay whatever shall be decreed. The mortgagor, on the non-payment of the money, has a right to foreclose the *equity of redemption, by a bill in equity. The proper parties being before the court, the mortgage and its non-payment being established, there is a decree for the payment of the principal and interest within a specified time, or in default thereof, that the mortgagor and those claim-

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ing under him be barred of their right to redeem. The mortgagor has a correspondent right to call on the mortgagee in equity, to accept his principal and interest, and costs at law, and to reconvey all his interest under the mortgage, free from incumbrances. A bill to redeem operates, in one respect, like a bill to foreclose; for if it be dismissed, in default of payment of the money, at the time specified, it has the precise effect of a foreclosure, and is equivalent to a foreclosure. (2 Madd. 420.)

The chancellor never treated or considered this as a bill to redeem; and if the respondents failed in complying with that part of the decree ordering the payment of the money adjudged to be due, it does not draw after it the consequences of a foreclosure. It is an established rule in equity, that relief inconsistent with the specific relief prayed for, cannot be given, under the general prayer for relief. A bill seeking general relief, and omitting an essential requisite to constitute it a bill to redeem, cannot be so regarded, nor draw after it the consequences incident to such a bill.

The foundation of the bill is, that the respondent was taking measures to sell the mortgaged premises, under a power in the mortgage from *Corl*, for securing the payment of 3000 dollars, whereas, it was registered as a mortgage for 300 dollars only: setting forth a purchase from *Corl*, the payment of part of the consideration, and the execution and delivery of notes for the residue. I shall consider the averment of the bill to be, that *Frost* and *Goddard*, at the time of the conveyance to them, had no knowledge of the appellant's mortgage, and that they were *bona fide* purchasers.

In *Patterson v. Slaughter*, (*Ambl.* 293.) Lord *Hardwicke* laid down the rule to be, that the title of a purchaser, for valuable consideration, is not ground for relief, though it is a good defence. No book of precedents, no treatise on equity, furnishes a case of a bill filed on the ground that there has been purchase without notice and for valuable consideration. Lord *Eldon* thus explains the defence: "the principle of the plea is this: I have honestly and *bona fide* paid for this estate, in order to make myself owner of it, and you shall have no information from me, as to the perfection or imperfection of my title, until you deliver me from the peril, in which you state I have placed myself, in the article of purchasing *bona fide*."

If the defendant has an equal claim to the protection of a court of equity, to defend his possession, as the plaintiff has to the assistance of the court, to assert his right, the court will not interfere on either side. This is the case when the defendant is a purchaser for a valuable consideration, without notice; this he may plead in bar of the suit; and the plea must always be put in upon oath. (*Mitford Pl.* 215.) The respondents attempt to make use of the fact of a *bona fide* purchase, for valuable consideration, and without notice, as a substantive ground of equity for offensive operation; thus

inverting the order of proceeding, and wholly dispensing with the essential part of what is merely a defence ; I mean the oath of the purchaser to his plea. Here there is no oath or proof of the fact, that the respondents were purchasers within the rule ; for the swearing to the bill by one of the respondents, for the purpose of an injunction, is, in no sense, the oath required to such a plea. As was to have been expected, there is no proof that the respondents had no notice of the mortgage as one for 3,000 dollars, before their purchase. In the nature of things, they could not prove that they had not notice. The appellant was entitled to have their denial of the fact of notice, and their averment that they were purchasers *bona fide*, and for valuable consideration, under oath. These considerations are, I apprehend, sufficient to show that the decree cannot be sustained.

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As the case has been argued at large, and as it may save litigation and expense, to have the opinion of the court on the merits, I proceed to examine them. Should the respondents file a bill to redeem the mortgage as registered, on *paying the 300 dollars, and interests and costs, the appellant must either avail himself, by answer, of the mortgage, as one for 3,000 dollars, or file his cross bill to foreclose it as such ; the question would then arise, supposing the respondents to be *bona fide* purchasers without notice, what would be the rights of the parties ? This involves the third point, whether the conditions upon which the *escrow* was to take effect, as the appellant's deed, have been complied with, so that the title passed to *Corl*. The conditions were, that *Corl* should pay the balance then due, and *have the mortgage*, (after executing that and the bond) *put on record*, and bring a certificate from the clerk that no mortgage or other incumbrances were against the lots ; Mr. *Westerlo* was then to deliver the appellant's deed to *Corl*. The deed was delivered on proof satisfactory to the agent ; but it is contended, that the condition of having the mortgage put on record was not complied with ; because, there was a mistake in the registry, in recording the mortgage, as one for 300 dollars, when it was, in fact, for 3,000 dollars ; and that, therefore, the delivery of the deed was unauthorized on the part of the agent. This condition must receive a reasonable construction. It was not an act expected to be done by *Corl* personally, for he had no right or power to do it ; this duty entirely appertained to the clerk. It would be unnatural and unreasonable, to construe this condition in any other way, than that *Corl* was to deliver the mortgage to the clerk, or his deputy, to be put on record. We ought not to interpret the condition with reference to the mistake which has occurred ; and it is clear that we cannot construe it literally. Had there been no mistake in the registry, can any one doubt, that the condition would have been fulfilled by *Corl's* delivering the mortgage to the clerk to be recorded, and that he had recorded

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it? It might, then, with the same force, be objected, that *Corl* did not personally put it on record. But, it is said, the mortgage was not recorded, in consequence of the mistake. It was recorded inaccurately; yet it was recorded, so far as respected *Corl*. Surely, it cannot be required of him, that he should stand by and see that the clerk does his duty. Both the appellant and Mr. *Westerlo* were satisfied, for a *long time, that *Corl* had performed the condition; thus the appellant left in *Corl's* hands the evidence that he was the owner of the property, and the power to implicate third persons relying on the fact, that *Corl* was the owner of the land, he having the appellant's deed for it. To insist, after such a lapse of time, as against third persons, upon the non-fulfilment of the condition, appears to me inequitable and unjust; and I, therefore, entirely concur in the opinion expressed by the chancellor, that the deed was well delivered; that the condition was performed according to the views, expectations, and instruction of the parties; and that it related back so as to validate the conveyance to *Frost* and *Goddard*.

I, also, agree with the chancellor, and for the reasons he has expressed, that the respondents are not to be charged with notice of the contents of the mortgage, any further than is set forth in the register, unless actual knowledge of the mortgage is brought home to them. I consider the respondents liable for the 300 dollars, with interest, and for any balance in their hands beyond that sum, and as to which they had not committed themselves to third persons, when they were informed of the real amount of the mortgage. I perceive no reason why they should pay the 300 dollars and interest, and, also, in addition to that, the balance in their hands; for if we admit that the registry was notice, as I think it was, to the amount of 300 dollars, the respondents have a right to say, that the sum unpaid, and in their hands, was intended to be applied towards satisfaction of the mortgage. I regret, that the bill was not so framed as to enable the court to put an end to the controversy; but justice must be administered on established principles, and according to established forms.

The decree must be reversed, with directions to the Court of Chancery to dismiss the bill, without prejudice to the respondents' rights.

WOODWORTH, J. It is objected by the respondents' counsel, that several points, not urged in the court below, are now relied on as grounds for reversing the decree. That the cause was fully argued before the chancellor, appears *from the report; and if it shall now appear, that the case presents important questions on the merits, to which his attention was not called, I should rather incline to believe they had escaped the researches of counsel, than that they were designedly waived or abandoned, for the purpose of bringing them, in the first instance, into view in this court. The rule is, undoubtedly, sal-
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utary, that no party shall be permitted to pass the court below in silence, and thereby make this a court of *original*, not *appellate* jurisdiction; neither will this court listen to objections, which, if made in the court below, might have been removed by the exercise of the ordinary powers of the chancellor, previous to, or at the hearing. But where the justice and law of the case are intimately connected with the new points raised, and are so material, that had they occurred either to the court or the counsel, it is evident they would have been examined, it would be a perversion of justice to deny a party the right to bring them into review when the cause is heard on appeal. In *Palmer v. Lorillard*, (16 *Johns. Rep.* 353.) it is said, "that the rule was only intended to be applied to objections, that the party may be deemed, by his silence, to have waived, and which, when waived, still leave the merits of the case to rest with the judgment. But if the foundation of the action has manifestly failed, we cannot, without shocking the common sense of justice, allow a recovery to stand." I consider the first, second, and sixth points, raised by the appellants, as embraced by this principle, and essential to be considered, in order to arrive at a correct decision.

I will examine the first and second points in connection.

The appellant contends, that the facts stated in the respondents' bill, give them no right to proceed against the appellant, as plaintiffs, in a court of equity; that both parties being equally innocent, and having equal equity, the bill should have been dismissed, and the parties left to their remedies at law. The scope of the respondents' bill is to obtain relief against the appellant's mortgage, on the ground that they are purchasers for a valuable consideration, without notice, concluding with a prayer for general relief. The question then is, whether, according to the course of the *Court of Chancery, this relief can be sought affirmatively by bill, or whether the party must not rely on it, by way of defence. If the facts charged, are only available when averred in the plea or answer, it follows they cannot form the ground for a decree, when alleged in the bill. The reason is obvious; they will, in many cases, protect and shield a defendant when assailed, but they do not permit him to become the assailant. I have not met with a single case where the allegation of being a purchaser for valuable consideration, without notice, was ever deemed sufficient to decree relief against a defendant, having equal equity with the plaintiff, nor indeed to any relief whatever; although the books contain numerous cases, where the same state of facts would constitute a perfect defence. In the case of *Patterson v. Slaughter*, (*Ambler*, 292.) Lord *Hardwicke* recognizes this distinction; in that case, the defendant having put in his answer, discovered that the person under whom he claimed, was a purchaser for a valuable consideration, without notice on petition to take the answer off the file, and put in a new

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answer, two methods were proposed, to give the defendant the benefit of this discovery: 1st. To file a cross bill; 2d. To put in a further answer. As to the first, the chancellor observes, "*the title of a purchaser for valuable consideration, is not ground for relief, though it is a good defence.*" If we examine this point, independent of authority, I apprehend we should arrive at the same conclusion; the material allegations in the bill are, that the plaintiffs are purchasers for a valuable consideration, without notice; but how can a plaintiff prove the want of notice? It is not susceptible of proof, from the very nature of the inquiry, without resorting to the evidence of the party averring the want of notice. When he elects to become plaintiff, he cannot testify for himself; the allegations in the bill are not evidence for him; they must be proved, or admitted, before relief can be granted. The case of a defendant in chancery is widely different; no decree can be made against the positive denial in his answer, unless disproved by two witnesses, or by one witness and circumstances. In many respects, the defendant is viewed in the light of a witness,*as well as a party. There is manifest propriety, then, in saying, that a purchaser, without notice, must act on the defensive; as a defendant, his oath, in the first instance, is competent testimony to prove the fact. He is the only person who can testify, that he had no notice; it rests within his knowledge. Third persons, it is true, may state facts and circumstances which render notice improbable, but there still is better evidence resting in the bosom of the defendant, which enables him, and him only, to say he had no notice when he purchased; but the moment he quits this rampart, and becomes plaintiff, he incapacitates himself. He is the only witness who can prove the fact; but, as plaintiff, he must make out his case *aliunde*. His shield, it is true, remains, but he has no weapons for offensive war. While defendant, his oath is sufficient, until the plaintiff charges him with notice by competent proof; but, when plaintiff, his opponent may rest on his arms, in safety, because the fact cannot be established, *prima facie*, so as to claim relief. If we examine the proof on behalf of the respondents, it will be seen, that as to the question whether the purchase was made without notice, we are left to conjecture. I have already shown that the oath of the respondents is not evidence; it can establish no fact, and must be rejected; if want of notice can be made out, the testimony must be derived from a different source. What, then, is the proof to support this essential part of the case? It is derived from the testimony of *Samuel Whitney*, who says, "that in the fore part of *September 1807*, he discovered the mortgage in question, on record in the clerk's office of *Onondaga*, and communicated the fact, immediately, to one of the sons of *Martin Goddard*; and he knows, that his communication was the first notice the said *Goddard*, or *Frost*, had of the said mortgage, from the circumstance of

Samuel Goddard's going the very next day to the clerk's office, to examine the records as to the fact; and, also, from the alarm they discovered, on their knowledge of its certainty. That his situation was such, that he would, in all probability, have heard of said mortgage as soon as Frost and Goddard." This is the only testimony to this point; and it may serve as an illustration of a preceding remark, that want of notice is a fact *which can only be proved by the party denying it, and cannot be established by evidence *aliunde*; if it could, in any supposable case, it cannot be pretended that this evidence amounts to any thing. The facts stated by *Whitney* are not inconsistent with full knowledge previously received by *Frost* and *Goddard*. This position will be obvious from a moment's consideration. *Whitney* discovered the mortgage in *September, 1807*; but how does this prove that *Frost* and *Goddard* had not discovered it previously? *Whitney* communicated his discovery immediately to one of the parties; but this does not prove that it was any discovery to *Goddard*; *non constat*, but that he knew the fact before; but *Whitney* knows, that this was the first notice to *Frost* and *Goddard*. How? Does he state a fact altogether inconsistent with previous notice to them, and on which he founds his knowledge? No: but *Goddard* went the next day to the clerk's office to examine; the answer is, he might have been informed repeatedly before, and become chargeable with notice of the existence of the mortgage, and yet not have been at the clerk's office; for it must be kept in mind that want of notice is not confined to the mortgage on record, but is a denial of a knowledge of the existence of the appellant's mortgage, whether registered or unregistered. The other circumstance, relied on by the witness, is the alarm they discovered. Now, the answer to this is, that neither their acts nor declarations can ever be made use of in their favor, although good evidence, if they make against them; besides, if it was contemplated that want of notice could be established by mere negative testimony, such as this, connected with the acts of the parties, to be benefited by establishing the fact, we should expect, in such a case, that their conduct and acts would correspond with the intent, and be calculated, at least, not to raise a presumption against them. The alarm, then, whether real or pretended, cannot be adduced, legally to establish any fact; for it is not susceptible of proof, any more than the want of notice itself. From the preceding considerations, I apprehend, it abundantly appears, that being a purchaser for valuable consideration, without notice, does not, of itself, form a substantive ground of relief by bill; and, secondly, that if it did, the proof *offered by the respondents failed to establish the fact. For the purposes of justice, there is no necessity, that a party averring want of notice, should be protected, other than by way of defence. In that case,

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having at least equal equity with the party seeking relief, he must prevail; but the case assumes a different aspect, when in the character of plaintiff, he asks the interposition of the court to restrain a party, having equal equity with himself, from proceeding at law. If the appellant can, at law, prevail against the respondents, chancery will not disturb him, because, both parties being innocent, and the equity equal, it will not interfere. Whether the appellant can have a perfect remedy at law, is not the inquiry. We leave the parties to contest their rights at law, without the restraint or interposition of a court of equity.

In applying this principle to the case under consideration, it will produce no injustice, or even hardship; for he who has superior right at law, has also equal equity with the party against whom he succeeds. I am aware, however, that in the situation in which the present parties are placed, a resort to a court of equity may become necessary, to protect the respondents against probable loss. If the appellant was proceeding to foreclose his mortgage by advertisement, according to the statute mode of foreclosure, then, for the safety of the respondents, it would be necessary to file a *bill to redeem*; for whether the mortgage could be enforced by the appellant, for the whole sum due, or not, I have no doubt it was a valid registry to the amount of *three hundred dollars*. If, therefore, a sale had taken place, the purchaser would, undoubtedly, hold discharged of the respondents' title; and if the premises were bid off for a sum equal to the appellant's demand, which is not to be doubted, the respondents might in vain seek to compel the appellant to pay over to them the amount exceeding the sum for which the mortgage had been registered. A bill to redeem this mortgage, by paying the 300 dollars and interest, would be a proper proceeding on the part of the respondents; in which bill it might be expedient to state the whole case, and, among other things, to aver, as they have in the present bill, that they were purchasers for valuable consideration, *and without notice, not on the ground that such allegation was competent proof, or any proof at all, to establish the fact affirmatively, but as a denial, for the purpose of repelling any presumption or inference, that they had knowledge or notice of a mortgage of a greater amount than the sum inserted in the registry; and but for the denial so made, such presumption or inference might be attempted to be raised and founded on the silence of the respondents on this point in their bill. In such a case, I incline to think redemption would be decreed on paying the amount registered, and such sum as should appear to have been unpaid by the respondents, on their purchases, at the time they were affected by notice, according to the principles of the chancellor's decree. It must, however, be understood, that such relief could only be granted on the supposition, that

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the deed to *Corl* had taken effect, and the appellant was obliged to look to the mortgage only for indemnity. IN ERROR

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The counsel for the respondents contended, on the argument, that this was a bill to redeem; but the authorities cited do not support the doctrine. The case of *Warren v. Rathbone*, (10 *Johns. Rep.* 587.) is not analogous. It is there decided, that "where a court of equity gains jurisdiction of a cause, for one purpose, it may retain it generally;" but this has no connection with the question, whether the bill in the present case contains the essential requisites of a bill to redeem. On looking into precedents, it will be found that no fact is better established, than that the plaintiff who seeks redemption must aver, "that he is ready to pay what is due for principal and interest on the mortgage." It can require no argument to prove that this is indispensable. How can the chancellor decree a redemption, without payment of what is due? It would be nugatory to make such a decree, unless the plaintiff makes the offer of payment. The plaintiff cannot be compelled to redeem on the terms of payment; it is at his election to do so or not. If he makes no offer, he does not lay the foundation for a decree to redeem, nor can he expect it, although the bill may contain a special prayer for that purpose. In this cause, the bill states, that on the discovery of the mortgage registered, *Frost* applied to the appellant, and proposed to pay the three hundred dollars, *and interest, which he refused to accept; this was some time before the filing of the bill. The offer is not made in the bill, nor does it appear by any thing contained in it, that they were willing to pay the money when the bill was filed; it is rather to be inferred, that the respondents contemplated relief on different grounds. The prayer of the bill is for an injunction to stay all proceedings under the mortgage, and for general relief. I do not consider this (unaccompanied with an offer to pay) as sufficient to authorize a decree to redeem. And, consequently, the case, as made out by the respondents, cannot, according to principles well established in the Court of Chancery, be sustained.

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With these remarks, I might dismiss the further examination of this cause; but as the parties may be disposed to bring up the question for relief in some other form, I think it will be useful now to decide another question presented for the consideration of the court, which, if decided against the respondents, puts this controversy at rest. I refer to the question whether the title to this lot ever passed out of the appellant. The examination of this point leads us to consider, whether the deed from *Beekman* to *Corl* was delivered as an *escrow*, and upon what conditions; and, secondly, have the terms or conditions agreed on between the parties been performed? If they have not been performed or waived by the appellant, the respondents cannot have relief in any shape, for in that event,

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they acquired no interest in the land by the purchase from *Corl*. The loss in such a case, of necessity, and rightfully, falls on the respondents; they purchased of, and confided in, the integrity of *Corl*. That confidence was, indeed, misplaced, and we impart to the victims of fraud and deception our commiseration, while we deny relief at the expense of a party who has not contributed to bring on them their loss.

In October, 1804, the deed from *Beekman* to *Corl* was received by Mr. *Westerlo*, enclosed in a letter, also covering a mortgage to be executed by *Corl* for the consideration money. The instructions in the letter are definite and certain. "*The deed to be delivered to Corl, provided he pays the balance now due as below stated, and has the mortgage (after executing it and the bond) put on record in the counties of Onondaga and Seneca, *and bringing a certificate from the clerks of Onondaga, Seneca, and Cayuga, that no mortgage or incumbrance are against those lots.*" This constituted a delivery as an *escrow*, and is so considered by the chancellor. A deed, so delivered, has no operation, and is not to take effect, until the conditions are performed. (*Co. Lit.* 36.) In construing the conditions on which the delivery was made, we are bound to give effect to the words made use of, according to their *known signification*, and, by such rule of construction, arrive at the intent of the appellant. When the words are perfectly plain and intelligible, we are not at liberty to say, the appellant intended something different, however plausible may be such a supposition. When the grantor says the deed shall take effect on the existence of a fact, we cannot put it on the production of evidence of that fact, however probable it may appear, that had the evidence of the fact, such as exists in this case, been proposed to the grantor at the time he made the conditional delivery, he would have been willing to substitute it for the fact itself. Until his consent is obtained, it would be a violation of all principle to change the meaning of the words employed. It would, in fact, be making contracts for parties, instead of adjudicating on them. The chancellor says, (and here, I apprehend, is the foundation of the error,) "the clerk's certificate of the registry was all that the letter to *Westerlo* could have intended." How this can be correctly said, I cannot conceive, for the appellant has no reference to the certificate, but the fact of putting on record. He does not say, that he will receive any, nor what kind of evidence of the fact, but he insists on the fact itself for his security; he had a right to say so; it was a prudent precaution; on this point he was not disposed to risk any thing. In the certificate there might be mistake or fraud, and thereby he might sustain loss; but if the fact existed, to wit, a true registry of the mortgage, his security was unquestionable. The appellant was about parting with his property, at a fair value, to *Corl*; he tells him, in

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substance, you shall have my title if you secure me. You, the mortgagor, must perfect the security. You are to receive the benefit of my title, when you have performed on your part; if casualties or mistakes occur, in carrying into *effect the stipulation on your part, you must abide the consequences. The chancellor seems to suppose, that if it was intended that actual registry should first be made, then it would become necessary for the agent to go to the county of *Onondaga*; and this, he says, was not expected. My answer to this is, that where the words used are plain, arguments *ab inconvenienti* can never be listened to, in order to prove an intent against the obvious meaning of the words. Whatever was required by the instructions, was the law to the agent, and he was bound by it, if he acted at all; he could not bind his principal beyond his authority, and in this case, being a special agent for a definite purpose, his acts beyond his authority were void.

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That the intent of the appellant was as I have endeavored to prove, is abundantly manifest, from that part of the instructions intended to guard against other mortgages or incumbrances on the lot; as to that fact, the appellant is satisfied with the production of a certificate from the clerks of *Onondaga*, *Seneca* and *Cayuga*, but not so as to the mortgage to be executed by *Corl*; *putting on record, is the indispensable requisite to give validity to the deed.* That this has not been done is admitted, for an erroneous registry is no performance. But, it is contended, on behalf of the respondents, that if the conditions have not been performed, there has been a waiver; and that the appellant has affirmed the deed, by advertising under the mortgage; and his honor the chancellor considers, that the appellant, by receiving the mortgage, with the evidence accompanying it, has thereby affirmed the delivery of the deed. When the mortgage was received by the appellant, the fact of the non-registry was unknown to him, and continued unknown until *September*, 1807, when *Frost* apprised him of the fact. The waiver of non-performance necessarily presupposes a knowledge of such non-performance. The question, then, occurs, how could the appellant waive what he did not know? Even in the case of a forfeiture, against which courts of law lean, the forfeiture is not waived when there is no knowledge that it has been incurred. If the lessor be ignorant that a forfeiture has been incurred, acceptance of the rent is not a waiver of it; (*Jackson v. Bronson*, 7 *Johns. Rep.* 227.) much less ought the waiver of the conditions to be admitted *in this case, when the effect of it is to deprive the appellant of a security calculated and intended to protect him. That the appellant may have believed, that the mortgage was correctly registered, is highly probable; the certificate would induce such a belief, but, still, it might be incorrect, and, as I have already observed, was not the thing stipulated. It did not con-

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clusively establish the fact, but was merely evidence of it. If it turned out that the mortgage had been registered, the deed took effect; if it did not, the title did not pass, and the appellant claimed nothing under the mortgage. He might well receive it, knowing, that in the event of a non-registry, he could derive complete protection under the conditions upon which his deed was delivered. That it was competent for him to ratify the deed, and affirm the mortgage, is admitted; but it is denied, that either is to be inferred, without knowledge brought home to the appellant, and his acts of affirmance subsequently.

The same reasoning applies to the fact, that in *August*, 1807, the appellant caused the mortgaged premises to be advertised under the mortgage. It will be remembered that, at this time, and until *September* after, the appellant remained in total ignorance of the mistake in the registry, and could not thereby be said to affirm the deed. On this question of affirming the deed, and accepting the mortgage, by acts done without knowledge of the mistake, let me ask, had the appellant known, that the registry of the mortgage was only good for 300 dollars, and such other sum as he might realize by bringing home notice to the purchasers, would he, for a moment, have hesitated in rejecting the mortgage altogether? The course that would have been taken is too plain a proposition to admit of doubt; yet, it is contended, that this election shall be denied, in consequence of acts done before a discovery was made, that the security was defective. The principle, it appears to me, would be an anomaly in our laws, demoralizing in its consequences, and subversive of justice and fair dealing in the community.

I have said that the mortgage was advertised in *August*, 1807. This fact is derived from the admission in the answer. The counsel for the respondents ask, admitting that the appellant was ignorant at the time he advertised, why did he proceed afterwards, until arrested by the Court of Chancery? The answer to this is conclusive; in the first place, there is not a particle of evidence in the cause, that the appellant ever did a single act, or that the notice of sale under the mortgage continued a single day, after the discovery was made. It would be wasting time to prove, that the allegations in the bill, if it contained any on this point, are not evidence; but there is no averment that the notice was continued after the discovery of a defective registry. The answer does not admit it, and no testimony has been given respecting it, consequently, the fact is not before the court; but if it should be conceded, that the advertisement, which was inserted in *August*, 1807, was not discontinued on the discovery of the error, it does not prove any act of recognition. The appellant was not called upon to act until the time of sale; then, indeed, he would arrive at a

crisis, when it would become necessary to determine. Before that time, the appellant remained passive; he may have omitted to discontinue the advertisement; and now we are called to conclude him, because he did not act. I apprehend, that this doctrine is equally unsound with that relied on, as derived from the acts of the appellant, done before he had knowledge of all the facts; besides, between the time of discovering the defective registry and the day of sale, he had time to deliberate, whether to affirm or disaffirm the mortgage. When he was first informed, it was impossible to decide what the result would be, if he pursued the mortgage. He was a stranger to the respondents and their purchases. The information he received ascertained the fact only, that the mortgage could not be enforced beyond 300 dollars, unless notice could be brought home to the respondents; if notice could be made out, then, indeed, he could not secure his debt, on the ground of a registered mortgage; but his redress would be equally certain, on the principle, that the respondents purchased with notice. Now, if the appellant's omission to discontinue the advertisement compels him to look to the mortgage for security, it causes this flagrant injustice, on the face of it; to wit, you shall elect *instantly*; time cannot be allowed to ascertain the facts, without a knowledge of which, no election can be made with prudence *or safety. I have thus shown, I think, conclusively, that the acts done before knowledge of the registry, and the omission to act afterwards, do not lay any foundation for a decree, adjudging that the appellant has, by his acts, given effect to the deed, and affirmed the mortgage; and, consequently, that the respondents are not entitled to any relief as against the appellant, on the facts appearing in this case, admitting that no objection could be taken to the pleadings.

From the view I have taken, it becomes unnecessary to notice particularly, two minor points made by the appellant's counsel, with respect to the interest of *Healy* and *Cole*; it does not appear, that they were interested when examined in chief; neither was their testimony essential, nor is it noticed by the chancellor in the opinion delivered. If their testimony before the master was objectionable, exceptions should have been taken to it, on the coming in of the report: and as to relief being extended to persons not parties, if the decree was sustainable in other respects, it might be modified so as to protect those only who are parties before the court.

On the whole, after a careful examination of this cause, with all the attention in my power, I have arrived at a conclusion, satisfactory to my own mind, that the respondents, as against the appellant, are not entitled to any relief, and, consequently, that the decree of his honor the chancellor be reversed, and the bill of the respondents dismissed.

IN ERROR

ALBANY,
April, 1820.BEEKMAN
v.
FROST.

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IN ERROR.**ALBANY,**
April, 1820.**BREKMAN**
v.**FROST.**

A majority of the court^(a) concurring in the opinion delivered by the *chief justice*, it was thereupon ORDERED, ADJUDGED and DECREED, that the decree of the Court of Chancery be reversed, and that the bill in the Court of Chancery be dismissed, without prejudice to the respondents; and that the record and proceedings be remitted, &c.

Decree of reversal.

(a) For reversing, 15; for affirming, 10.

END OF THE CASES IN ERROR.

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TO

THE PRINCIPAL MATTERS

CONTAINED IN THE EIGHTEENTH VOLUME.

A.

ABATEMENT.

The pendency of another suit, in another court, between the same parties, and for the same cause of action, may be pleaded in abatement; but it cannot be given in evidence under the general issue. *Percival v. Hickey*, 257

Vide JOINT DEBTORS.

ACTION.

Commencement of action.

1. The *issuing of the writ* is the commencement of the suit, in all cases where the time is material, so as to save the statute of limitations. *Burdick v. Green*, 14
2. And it is not necessary to show, that the writ has been returned, nor that it was actually delivered to the sheriff. *ib.*
3. It is sufficient, if it appear that the writ was made out and sent to the sheriff or his deputy, by mail, or otherwise, with a *bona fide*, absolute, and unequivocal intention of having it served. *ib.*

Vide PRACTICE, VIII. 13. SALE OF GOODS AND CHATTELS. 2 TURN- VOL. XVIII. 56

PIKE AND TURNPIKE COMPANIES, 5. LEGACY.

Limitation of Actions, *vide* LIMITATION.

ACTIONS REAL.

A demandant in *doer* may be called on the *first* day of the term, and if she does not appear, her default may be entered; and if she does not appear on the *fourth* day of the term, and excuse her default, a judgment of nonsuit may be entered. *Van Bergen v. Palmer*, 504

Action of assumpsit, *vide* ASSUMPSIT.
Action on the case, *vide* TRESPASS.
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ADMIRALTY.

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AGENT.

1. A special agent has no authority 441

to bind his principal, by any act not within the scope of his authority.
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2. *B.* sold goods to *L.*, on a credit, and before the term of credit expired, apprehending the insolvency of *L.*, applied, on the 3d of *October*, 1817, for payment or security; and *C.*, a clerk of *L.*, employed in his store at *G.*, to keep the books and accounts, and to sell goods by retail, in the absence of *L.*, gave an order on *D.*, another clerk of *L.*, at *P.*, to deliver goods to *L.* to the amount of his demand; *B.*, accordingly, received the amount, partly in the same goods he had before sold to *L.*, and partly in other goods. An execution on a judgment against *L.*, in favor of *M.*, was delivered to the sheriff on the 24th of *September*, 1817, and another execution on a judgment in favor of *K.*, on the 28th of *October*, and the sheriff seized the goods so received by *B.*, in his hands, and sold them, and applied the proceeds to the last execution; in an action of trespass, &c. brought by *B.*, against the sheriff; *Held*, that *C.*, the clerk of *L.*, had no authority to deliver the goods to *B.*; and, although it did not appear that *L.* had ever disaffirmed the act of *C.*, and a stranger could not object to his want of authority; yet the sheriff, acting in behalf of the judgment creditors who were interested, was not to be considered in the light of a stranger, and might insist, that the property in the goods was not changed by the delivery of them to *B.*, for want of authority in *C.* *ib.*

Public Agents, *vide* OFFICE AND OFFICER.

AGREEMENT.

- I. *Construction of an agreement.*
- II. *Performance.*

I. *Construction of an agreement.*

- 1 There was a special agreement in 442

writing between *R.* and *H.*, relative to the sale and exchange of two farms, in which it was stipulated, among other things, that *R.* was to be allowed ten dollars per acre of the price of the farm occupied by *H.*, as an equivalent for the release of all claims to it by *R.* The parties, afterwards, endorsed on the contract an agreement, that the price which *R.* was to pay, and which *H.* was to receive as the price of his farm, was forty dollars per acre; *Held*, that the stipulation endorsed was not an absolute, independent contract, of itself; but was a modification merely, of the original contract to which it referred; and that both were to be taken together as one instrument, and to be construed according to the intention of the parties, to be collected from the whole contract; and there being no ambiguity in the agreement, parol evidence was admissible to explain it. The agreement endorsed, therefore, was not, that *R.* was to pay *H.*, absolutely, 40 dollars per acre for his farm, but that price, subject to the deductions mentioned in the original agreement.
Van Hagen v. Van Rensselaer, 420

II. *Performance.*

2. Where a party to an agreement insists on the payment of stipulated damages, as a discharge, it must appear that the damages stipulated are *in lieu of a performance* of the contract, the payment of which is an alternative, for his election.
Gray v. Crosby, 219
3. A controversy having arisen between the plaintiff and defendant, about a bond and mortgage of the plaintiff, held by the defendant, they entered into an agreement that three persons, named by them, should appraise the land and premises, and ascertain what was due on the bond and mortgage, and strike the balance, and the

party against whom the balance was found, should immediately pay the same to the other party, &c. And it was agreed further, that if either party should refuse to fulfil the agreement, he should pay to the other 500 dollars, "which should be considered as liquidated damages." The land was, accordingly, appraised, the balance due on the mortgage ascertained, and a balance of 310 dollars found in favor of the plaintiff; *H. Id.*, that the defendant could not, on offering to pay the 500 dollars liquidated damages, consider the agreement as rescinded, and set off so much of the debt as was found due to him on the bond and mortgage as would satisfy that amount, and have the balance certified in his favor; but that the plaintiff was entitled to recover the balance of 310 dollars, so found by the appraisers, but not the sum agreed as liquidated damages, for not performing the agreement. *ib.*

Vide DAMAGES.

AMENDMENT.

- I. *Of declaration or plea.*
- II. *Of record or execution.*

I. *Of declaration or plea.*

1. The plaintiff cannot amend his declaration, nor the defendant his plea, as of course, within the *twenty days*, by adding a new count or a new plea; it can only be done by leave of the court. *Siver v. North*, 310

Vide PLEADINGS, II.

II. *Of record or execution.*

2. Where an executor pleaded a false plea, and the judgment and execution were *de bonis testatoris, si non, de bonis propriis, &c.*, after a return of *nulla bona* to the execution, the court allowed the judgment and execution to be amended, so as

to be of the *lands and tenements* also. *Lansing v. Lansing*, 502

APPEARANCE.

Vide LUNATIC.

ARREST.

Vide PRIVILEGE.

ARSON.

1. Setting fire to a jail by a prisoner, merely for the purpose of effecting his escape, is not *arson*. *People v. Cotteral*, 115
2. Nor is it a *wilful burning of an inhabited dwelling-house*, within the meaning of the first section of the act declaring the punishment of crimes; (1 N. R. L. 407. sess. 36. ch. 20.) though the *jail* is to be deemed an *inhabited dwelling-house*, within the act. *ib.*

ASSIGNMENT.

The assignee of a debt takes it subject to all the equity existing at the time, between the debtor and the assignor. *Bank of Niagara v. McCracken*, 493

Vide LEASE. FREIGHT AND CHARTER PARTY.

ASSUMPSIT.

- I. *On the implied promise, or general count, notwithstanding a special agreement.*
- II. *For money had and received.*
- I. *On the implied promise, notwithstanding a special agreement.*
1. Where the declaration contains a special count on a promissory note, and, also, the common counts, for money lent, &c. and for goods sold, &c. the plaintiff may elect the counts on which to give the note in evidence. *Burdick v. Green*, 14
2. Where there is an express contract for a stipulated amount and mode of compensation for services, the

party rendering the services, cannot waive the contract, and resort to an action for a *quantum meruit*, on an implied *assumpsit*. *Champion v. Butler*, 169

3. Where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff may, if he fails to prove the special agreement, abandon the special count, and resort to the general count. *Robertson v. Lynch*, 451
- 4 But this cannot be done, if the goods were, in fact, sold under the special agreement, and the plaintiff might, if he had framed the special count properly, have recovered upon it. *ib.*

II. *For money had and received.*

5. Where the plaintiff claimed a sum of money of the defendant, who denied it, but promised that if the plaintiff would swear to the correctness of the claim, he would pay it; and the plaintiff made affidavit accordingly: *Held*, that this was a valid promise; and that in an action of *assumpsit* brought to recover the amount sworn to, it was not competent to the defendant to prove that the plaintiff had sworn falsely, or that he was mistaken in his affidavit. *Brooke v. Ball*, 337
6. Where money is paid by the plaintiff to the defendant, by mistake, notice of the mistake, and demand of repayment, before bringing a suit to recover it back, are not necessary; for the party receiving the money paid under a mistake of facts, is not a bailee or trustee, nor does his duty to return it arise upon request. *Utica Bank v. Van Gieson*, 485
7. If notice and demand were necessary, in such a case, putting a letter containing such notice and demand, directed to the defendant, into the post office, is sufficient. *ib.*

Vide FRAUDS, STATUTE OF, 1. 3. GIFT.
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AUDITA QUERELA.

It seems, that the writ of *audita querela*, being an equitable remedy, is applicable rather to the case where the defendant is entitled to relief against a judgment, than to the case of an execution irregularly issued. *United States Bank v. Jenkins*, 305

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AWARD.

Vide PRACTICE, VIII.

B.

BAIL.

Bail are entitled to an *exoneretur*, where their principal has been convicted of a *felony*, and sentenced to be imprisoned in the state prison of another state, for a term of years. *Loffin v. Fowler*, 330

Vide INSOLVENT DEBTOR

BANK OF UTICA.

Vide UTICA BANK.

BARON AND FEME.

- I. *Marriage.*
- II. *Actions by and against husband and wife.*

I. *Marriage.*

1. Cohabitation, and the declaration of the parties, are, *prima facie*, evidence of marriage. *Jackson, ex dem. Van Buskirk, v. Claw*, 346
2. But where, without any apparent rupture, the parties, after a cohabitation of about two years, separated, nearly forty years ago, and continued separate without any claims or pretensions on each other as husband and wife, *it seems*, that the presumption of marriage arising

from their former cohabitation, will be rebutted. *ib.*

3. *A.* and *B.* after cohabiting as husband and wife, separated, in 1781, and the wife went to her friends in 1783, when she removed out of the state, and was never heard of afterwards. Her husband, in 1781, married another woman, with whom he lived *thirty-eight* years, and died, leaving children by her: *Held*, that the absence of the first wife, for *seven years*, from 1783 to 1790, without being heard of during that time, was sufficient to afford a presumption of her death; and although the second marriage of *A.*, in 1781, was void, his first wife being then living, yet his continued cohabitation with his second wife for twenty-seven years after 1790, and the reputation of their marriage, and the good character in society of the parties, during all that time, and until the death of the husband, afforded sufficient ground to presume an actual marriage between them after 1790, so as to entitle the second wife to *dower* in the lands of which her husband was seized during that period. *Jackson, ex dem. Van Buskirk, v. Claw,* 346

11. Actions by and against husband and wife.

4. Where a married man sailed in a vessel from *New-York*, on a voyage to *South America*, and neither he nor the vessel had ever been heard of since, this was held to be sufficient presumptive evidence of his death, on a plea of *coverture*, in an action against the wife, as a *feme sole*, brought *twelve* years after the departure of her husband. *King v. Paddock,* 141

Vide EXECUTION, 8, 9, 10. PLEADINGS, VIII.

BARGAIN AND SALE.

Where the words of a deed were, "For value received of *G.* and *B.*, I here-

by make over and confirm unto them, and their heirs." &c. *Held*, that these words were sufficient to raise a use under the statute, and to convey the premises to the bargainee, in fee. *Jackson, ex dem. Bond, v. Root,* 60

BILL OF LADING.

Vide FREIGHT AND CHARTER PARTY.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

- I. *Transfer or endorsement.*
- II. *Payment; when and how demanded and made.*
- III. *Notice of non-payment; when and how to be given.*
- IV. *Liability of Parties, and how discharged.*

I. *Transfer or endorsement.*

1. Where a note is endorsed in blank, and the holder fills up the blank, directing payment to be made to a particular person, merely for the purpose of *collection*, and the agent returns the note, with the protest for non-payment, to such holder, he may strike out the special endorsement, and make it payable to himself, so as to bring an action, in his own name, against the endorser. *Bank of Utica v. Smith,* 230
2. After a note was made, and endorsed for the accommodation of the maker, he, without the knowledge or consent of the endorser, (both of whom resided in *Albany*, where the note was made,) added, in the margin, "payable at the bank of *America*," and payment was demanded at that bank, in the city of *New-York*, and due notice of non-payment sent by post to the endorser in *Albany*; *Held*, that the addition of the place of payment was an immaterial alteration, and did not vitiate the note; and that the demand and notice were sufficient to charge the endorser. *Bank of America v. Woodworth,* 315

II. *Payment, when and how demanded.*

3. A demand of payment of a note by a notary, or a person having a parol authority for that purpose, or the lawful possession of the note, is sufficient; and the notary or person authorized, may give notice of non-payment to the endorser. *Bank of Utica v. Smith*, 230
4. A note made payable at the *Mechanics' Bank*, in the city of *New-York*, was presented to the *first teller* of the bank, by a notary, 15 minutes past three o'clock, P. M. of the day on which it was payable, and payment demanded: *Held*, that this was a sufficient presentment and demand, though the bank closes at 3 o'clock, P. M.; it appearing to be the usual course of doing business in the bank, to allow that time after banking hours for the presentment and payment of notes; and if the defendant was at the bank on that day, and offered payment, it was for him to show the fact; but he is bound to wait the usual time. *ib.*
5. A previous demand of payment of a bank note, not being payable at any particular place, is not requisite before a suit brought thereon, or to entitle the holder to set it off against the bank. *Bank of Utica v. McCracken*, 493

III. *Notice of non-payment, when and how given.*

6. A holder of a note is not bound to give the earliest possible notice of its non-payment: All that is required, in this respect, is ordinary and reasonable diligence. *Bank of Utica v. Smith*, 230
7. Any person who is a party to a note or bill, may give notice of its dishonor to the other parties. *Stafford v. Yates*, 327
8. A notice given by the *holder*, to the several endorser, enures to the benefit of the endorsee, or preceding parties. *ib.*

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9. So, that the first endorser of a note, who has received notice of its dishonor from the *holder*, but not from the second endorser, is liable to such second endorser, in the same manner, as if the notice had been received from him. *ib.*

Vide EVIDENCE, 21.

IV. *Liability of Parties, and how discharged.*

10. *It seems*, that if the holder of a note sues the maker, and issue is joined in the cause, and the plaintiff, afterwards, takes a *relicta et cognovit*, and gives the defendant a stipulation not to issue execution on the judgment entered on the *cognovit*, until a certain day thereafter, before which day, according to the course and practice of the court, the cause could not have been brought to trial and a judgment obtained, it is not such an indulgence, or giving time to the maker, as will discharge the endorser. *Hallet v. Holmes*, 28
11. Though the last endorser delays, for more than a year, to take up the note, and bring his action against a prior endorser, who has received notice of non-payment from the *holder*, the delay does not affect his right of action against the first endorser. *Stafford v. Yates*, 327

BLOCKADE.

Vide FREIGHT AND CHARTER PARTY.

BOND.

1. Where the condition of a bond is for the payment of money at a fixed day, evidence contradicting or varying such express condition is inadmissible. *Wells v. Baldwin*, 45
2. But if the bond is without a condition, and the plaintiff has executed a separate instrument of defeasance, such defeasance may be pleaded to an action on the bond *ib.*

Vide PLEADING, II

C.

CHALLENGE.

Vide TRIAL.

CHANCERY.

1. A court of chancery will not sustain a bill, which is in the nature of a bill for a new trial at law. *Anderson v. Roberts, in error*, 515
2. It is essential to a bill to redeem a mortgage, that the plaintiff should offer to pay the debt, interest and costs. *Beekman v. Frost, in error*, 544
3. That the plaintiff is a *bona fide* purchaser, for a valuable consideration, without notice, is not ground for relief, though it is a good defence in equity. *ib.*
4. As, where there was a mortgage given to secure a debt of 3,000 dollars, which was registered as for a debt of 300 dollars only; and the plaintiff, who was a *bona fide* purchaser, without notice, filed a bill to be relieved against the mortgage beyond the sum expressed in the registry, and stay the mortgagee from proceeding to sell the land under a power of sale contained in the mortgage, &c. *Held* that this was not a bill to redeem, and that the plaintiff could not sustain the bill for relief, though he might set up the facts as ground of defence. *ib.*

CHARTER PARTY.

Vide FREIGHT AND CHARTER PARTY.

CITIES.

Vide NEW-YORK.

COLUMBIA TURNPIKE COMPANY.

Vide TURNPIKES AND TURNPIKE COMPANIES.

COMMON SCHOOLS.

1. Under the act for the establishment

of *Common Schools*, passed April 15, 1814, sess. 37. ch. 192. the *freeholders and inhabitants of the school district*, at their regular meeting, must vote a *precise and definite sum*, as a tax on the inhabitants of the district, for building a school house, &c. *Robinson v. Dodge*, 351

2. The *trustees of the school district* are not authorized, by a general vote of such meeting, for levying a tax for defraying the expenses of building a school-house, without specifying the sum to be levied, to issue their warrant to levy the amount of moneys expended by them for that purpose. *ib.*

CONDITION.

Vide LEASE.

CONSIDERATION.

Vide GIFT.

CONSIGNOR AND CONSIGNEE.

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CONTRACT.

Vide FREIGHT AND CHARTER PARTY AGREEMENT. ASSUMPSIT. MASTERS AND OWNERS OF VESSELS.

CORPORATIONS.

Vide POOR. PLEADINGS, II.

COSTS.

1. If a plaintiff, after giving notice of trial, *countermands* it, he must pay the *costs* incurred by the defendant, between the time of receiving notice of trial and the countermand. *Keys v. Beardsley*, 135
2. Where there are several suits depending between the same parties, and which are included together, on the same paper, in one affidavit and notice of motion, one bill of costs only is allowed to be taxed, on granting the motion. *Jackson, ex dem. Burnett, v. Keller*, 310

3. The fees paid for *exemplification of records* produced in evidence on the trial of a cause, may be taxed in the costs to be recovered in the suit. *Jackson v. Root*, . 336

Vide PRACTICE X.

COURT OF ERRORS.

1. An objection not made by the party in the court below, cannot be made in the Court of Errors. *Beekman v. Frost*, in error, 544
2. Nor can a point or question which, had it been raised in the court below, might have been met and obviated, be raised in the Court of Errors, for the first time. *ib.*
3. *Aliter*, if the point raised in the Court of Errors could not, by amendment or proof, have been obviated in the court below. *ib.*

COURT OF OYER AND TERMINER AND GENERAL JAIL DELIVERY.

Vide COURT OF GENERAL SESSIONS OF THE PEACE. NEW TRIAL, II.

COURT OF GENERAL SESSIONS OF THE PEACE OF THE CITY OF NEW-YORK.

1. The Court of General Sessions of the peace of the city and county of *New-York*, having, by statute, (sess. 36. c. 85. s. 9.) all the powers of a court of *Oyer and Terminer and Jail Delivery*, and to try for all crimes, (cases affecting life only excepted,) and to determine and adjudge the same, it possesses, also, as an incident of the power to try, the right of discharging the jury, under the circumstances in which a court of *oyer and terminer* could do so. *People v. Goodwin*, 187
2. Whether, since the statute, it has, also, the power of granting a new trial on the merits? *Quere. ib.*
3. Where a prisoner tried at the *Court of General Sessions of the peace*, is brought before this court on *habeas*

corpus and *certiorari*, and a second trial is awarded, the trial may be before a court of *oyer and terminer and jail delivery*, or at the next sittings in *New-York* or *Albany*, under the act, sess. 36. c. 66. *ib.*

COURTS OF JUSTICES OF THE PEACE.

1. Though *partnership* accounts may be adjusted and closed in an action of account, at law; yet the courts of justices of the peace have no jurisdiction of an action of account; and any other action by one partner against his co-partner, there being no account stated, or balance admitted between them, is not sustainable at law. *Rickey v. Boone*, 131
2. In an action of trespass in a *justice's court*, where there is a verdict and judgment for the defendant, this court will not reverse the judgment, on a *certiorari* brought, merely because the verdict is against evidence, if it appears that the injury was trivial, and the plaintiff entitled to nominal damages only, and the suit is merely for costs and vexation. *Cady v. Fairchild*, 129
3. Under "the act to extend the jurisdiction of justices of the peace," sess. 41. c. 94. passed April 10th, 1818, where the demand exceeds twenty-five dollars, either party has a right to demand, that the jury should consist of *twelve*; but the party must make his demand for that purpose before the *venire* issues, in order that *twenty* may be summoned: and if he waits until the *venire* is returned with twelve jurors, six of whom are sworn, he is too late, and is concluded. *Strong v. Beardslee*, 130
4. The 18th section of this act requires the justice, after an *appeal* has been made to the *Court of Common Pleas*, to return to that court, the proceedings before him; and, among other things, the names of the witnesses sworn and examined,

and the names of those offered and rejected: *Held*, that by the word, "*witnesses*," was intended not merely persons called to testify, and sworn or rejected, in a technical sense, but *evidence*; and that, therefore, the justice must, in his return, state not only the names of the persons offered or sworn as witnesses, but the *documentary* or *written evidence*, admitted or offered, and rejected by him; otherwise, on the trial before the Court of C. P. any *documentary* evidence not stated in the return could not be admitted: it being the intention of the act to confine the parties, after an appeal, to the same issue, and the same evidence taken in the court below, excepting such evidence as may have been offered, and improperly rejected by the justice. *M Chesney v. Lansing*, 388

- 5 Where a jury is demanded, and a *venire* issued, at the instance of one of the parties, the *costs* of the *venire* abide the event of the trial before the justice. *Rickey v. Bowne*, 131
6. The act (sess. 41. c. 94. s. 17.) which gives the party aggrieved, where the judgment is above 25 dollars, an *appeal* to the Court of Common Pleas, refers only to cases in which a judgment is given, *after trial of an issue in fact*, and not to a case of a judgment on *demurrer*, or an issue at law. *Peters v. Parsons*, 140
7. In an action before a justice of the peace, the defendant cannot set off a judgment recovered by him against the plaintiff, before another justice, and which had been removed into this court by *certiorari*. *Willard v. Fox*, 497

COVENANT.

Vide LEASE.

COVERTURE.

Evidence of, *vide* **BARON AND FEME, II.**
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D.

DAMAGES.

Stipulated.

Where a party to an agreement insists on the payment of *stipulated damages*, as a discharge, it must appear that the damages stipulated are in *lieu of performance* of the contract, the payment of which damages is an alternative for his election. *Gray v. Crosby*, 219

DEED.

- I. *Acknowledgment and proof.*
- II. *Construction.*
- III. *Delivery—Escrow.*
- IV. *Rasure.*

I. *Acknowledgment and proof.*

1. A power of attorney to demand and receive a debt secured by a mortgage, and to execute a release and discharge thereof, is not within the act concerning deeds, scss. 36. c. 97. (1 *N. R. L.* 369.) and, therefore, is not entitled to be read in evidence on the certificate of acknowledgment or proof thereof before a judge; but must be proved by the subscribing witnesses, or other evidence of its execution. *Jackson, ex dem. Barclay, v. Hopkins*, 487
2. Though the existence of an absolute deed may be proved by a recital in another deed, against the party making such recital; yet, it seems, that the existence of an outstanding mortgage cannot be proved by such recital; for if produced, it might appear to have been satisfied, no release being necessary to reconvey the title to the mortgagor. *Jackson, ex dem. Randall, v. Davis*,

II. *Construction.*

3. Where a *soldier* endorsed a conveyance on his *discharge*, in which he described the premises, as fol-

lows: "The six hundred acres of land due from the public, as a *soldier* in *Colonel Lamb's* regiment of artillery;" when, in fact, he was not a soldier in that regiment, but in the *first*, or *Col. Van Shaick's* regiment: *Held*, that the description was sufficient, and that the words, "in *Col. Lamb's* regiment of artillery," might be rejected as surplusage. *Jackson, ex dem. Bond and others, v. Root*, 60

4. Where the premises in a deed were described as lot No. 51. in the second division of a patent, "bounded as follows, beginning at a stake and stones," &c. giving the monuments, courses, and distances; and it was proved, that the grantor, at the time of the conveyance, owned lot No. 50. in the same patent, and that the monuments, courses, and distances, exactly corresponded with those found on the land, and that unless this land was conveyed by the deed, it would be inoperative and of no effect: *Held*, that the words, "lot No. 51." might be rejected as surplusage, the description of the premises being sufficiently certain without them. *Jackson, ex dem. M'Naughton, v. Loomis*, 81
5. If there is a contradiction in a description, that part of it is to be taken which gives most permanence and certainty to the location. *ib.*
6. Where a deed describing land conveyed, is illegible, or so as to render it uncertain what is conveyed, the deed is so far inoperative. *Jackson, ex dem. Swain, v. Ransom*, 107
7. But where a lot of land was described in a deed by figures, which the plaintiff read 174, and the defendant 84, and from the examination of the whole deed, the jury and the court were satisfied that it was 174, it was *held* to be sufficiently certain. *ib.*
8. Where the premises in a deed, being a lot of land, are described by a number of the lot, and, also,

as having been granted by letters patent to *W.*, &c. and by him conveyed to *J. H.* the grantor, "as by reference to that deed will more fully appear;" and in the last deed the number was 84, and in the deed referred to, 174, it was held, that omitting the number in the last deed, the premises were described with sufficient certainty, to pass the lot mentioned in the deed referred to as No. 174. *ib.*

III. Delivery—Escrow.

9. Where a deed was deposited by the grantor with *W.* as an *escrow*, to be delivered to the grantee, on his producing a mortgage executed and registered, and a certificate of the clerk of there being no other incumbrance on record; and *W.* on receiving the mortgage and certificate of the clerk, &c. delivered the deed to the grantee, and the mortgage to the grantor: *Held*, the condition was performed, and the deed well delivered to the grantee; and that it related back so as to give effect to an intermediate conveyance by the grantee to *C.* although the clerk made a mistake in the registry of the mortgage, as to the amount of the debt secured; the registry expressing only 300 dollars, when the debt mentioned in the mortgage was 3,000 dollars. *Beekman v. Frost, in error*, 544

IV. Rasure.

10. The rasure of a deed, if done with the consent of the parties, does not invalidate it. *Penny v. Corwithe*, 499
11. And the fact of rasure, though there is a subscribing witness to the deed, may be proved by any other person. *ib.*

Vide BARGAIN AND SALE. POWER

Loss of Deeds, *vide* EVIDENCE, VII.
10.

DEFEASANCE.

Vide BOND.

DEMURRER.

Vide PLEADINGS, IV.

DONATIO MORTIS CAUSA.

Vide GIFT.

DOWER.

Title of the Widow, *vide* BARON AND FEME.

DEVISE.

1. Where a testator devised to his son, a farm, &c. without words of inheritance, or expressing the quantity of the estate devised, the son complying with the directions of the testator, to furnish his mother with firewood and grain of all sorts, for her comfortable support; and in case she should not choose to live in the dwelling-house, (included in the farm so devised,) in the event of the son's marriage, that then he should build a house for her, on another part of the testator's land; this was held to be a charge on the person of the devisee, in respect to the estate devised, and that he, therefore, took an estate in fee, by implication. *Jackson, ex dem. Ruggles, v. Martin*, 31
2. But without such a *personal* charge, the devisee would have taken an estate for life only. *ib.*
3. *H.* by his will, dated April 5, 1771, devised, as follows: "My will and pleasure is, that my son *John* should have the farm which I now live upon, &c. two of the best negroes, all my wearing apparel, three geldings, &c. But if my said son may happen to die, unmarried, without lawful issue, then it is my will and pleasure, that the said estate shall descend to the next heir of the name of *H.*, and that he may not sell, exchange, or dispose of any part of said estate, without

the consent, approbation, and concurrence of my executors." The testator died in *August*, 1775, leaving five sons and eight daughters, and nephews and nieces. *Held*, that *John*, the devisee, took an *estate tail* by implication; and that the devise over, depending on an indefinite failure of issue, was not good as an executory devise: and that the estate tail, being converted into an estate in fee simple, by the statute, (1 *N. R. L.* 52.) descended, on the death of *John*, to his heirs at law, according to the statute regulating descents. *Jackson, ex dem. Herkimer, v. Bel-linger*, 368

DISCONTINUANCE.

Vide PRACTICE, X.

E.

EJECTMENT.

- I. *Title of the parties.*
- II. *Notice to quit.*
- III. *Defence.*
- IV. *Declaration; Amendment of.*
- V. *Proceedings, where the tenant enters into the consent rule.*
- VI. *Judgment, writ of possession, and mesne profits.*

I. *Title of the parties.*

1. The plaintiff in ejectment claimed title under a sheriff's sale, on an execution; and the exemplification of the record of the judgment stated, that it was filed and docketed, on the 22d day of *May*; and the execution directed the sheriff to levy on the lands of which the defendant was seized on the 2d *May: Held*, that this was not such an irregularity as would destroy the title of the purchaser under the sheriff's sale: and the clerk of the court having certified that there was an error in the exemplification, and that the record was, in fact, filed on the 2d *May*, a new trial

was refused. *Jackson, ex dem. Randall, v. Davis,* 7

2. A purchaser at a sheriff's sale, of all the right and title to land, of a mortgagor in possession, is entitled to recover in ejectment against the mortgagor, though the mortgagee was made a co-defendant, and the mortgage outstanding. *ib.*

II. Notice to quit.

3. A mortgagor in possession is entitled to notice to quit, before an action of ejectment is brought; but if the mortgagor sells the premises absolutely, the purchaser from him is not entitled to notice to quit. *Jackson, ex dem. Barclay, v. Hopkins,* 467
4. An assignment of the mortgage, by the mortgagee, does not destroy the privity of the estate, or change the condition of the mortgagor's tenancy. *ib.*
5. Offering to show that the mortgage had been paid and satisfied, is not waiver of notice to quit. *ib.*

II. Defence.

6. Where the lessor of the plaintiff, who became the purchaser of the title of a mortgagor in possession of land, under a judgment and execution, had covenanted with the defendant to postpone the sale under the execution for two years: it is no defence, in the action of ejectment, that the sale to the lessor had been made before the expiration of the two years, and in violation of his covenant. *Jackson, ex dem. Randall, v. Davis,* 7
7. An adverse possession, for twenty years, under claim or color of right, gives a title. *Jackson, ex dem. Roosevelt, v. Wheat,* 40
- 8 To constitute such an adverse possession, it is not necessary that the possession should be taken under a good right or title. *ib.*
8. *P. Jackson, ex dem. Vanderlyn, v. Newton,* 355
9. If, on the trial, the defendant shows

that he took possession, claiming under a deed, he is not bound to produce the deed, though called for by the plaintiff, but may rely on his adverse possession. *ib.*

8. *P. Jackson, ex dem. Vanderlyn, v. Newton,* 355
10. And if the party produces the deed, and it is found defective, it will not destroy the effect of his adverse possession. *Jackson, ex dem. Vanderlyn, v. Newton,* 355
11. If a party in possession claiming title under a deed, supposing that there is some defect in the execution of the deed, applies to purchase the title of a person claiming the same premises, under a subsequent deed, with a view to strengthen or quiet his own title, it is not an abandonment of his own title, nor an acknowledgment of a superior title in another. *ib.*
12. Where the defendant entered into possession, claiming title, and afterwards took a deed for the land from the legal owners, under whom the plaintiff derived title, by a subsequent deed, the possession of the defendant is to be considered as adverse, from the beginning, or, at least, from the date of his deed; and not that its adverse character commenced from the date of the deed to the plaintiff. *ib.*

IV. Declaration; Amendment of.

13. Before trial, in ejectment, the declaration may be amended, by enlarging the term, or adding a new demise, on payment of costs. *Lion, ex dem. Edcn, v. Burtis,* 510
14. But where there was an actual entry, and an actual lease, for the purpose of avoiding a fine, and the demise in the declaration was, by mistake, laid on the first, instead of the sixth day of May, the court, in allowing the amendment, gave the defendant leave to elect, in twenty days, whether to defend the suit or not; and if he chose to defend, then to have the costs of the amendment only; but if he

- abandoned his defence, then he should have costs to the time of his election. *ib.*
15. Whether in such case, the judge at the trial can allow the amendment to be made? *ib.*
16. If the objection on the ground of variance, is made at the trial, and the plaintiff is nonsuited, it *seems* that the court will set aside the nonsuit, and give leave to amend, on payment of costs. *ib.*
17. Where the judge at the trial refused to nonsuit, but reserved the question as to the variance, and the defendant went into his defence fully at the trial, the plaintiff was allowed, after verdict, to amend his declaration, on the usual terms, under the circumstances of the case, it being a mere clerical mistake. *ib.*

Vide EVIDENCE, VIII. 13. IX. 14.

V *Proceedings in ejectment, where the tenant appears and enters into the consent rule.*

18. Where a defendant in ejectment means to defend as a tenant in common with the lessors of the plaintiff, on the ground that there has been no ouster of the co-tenants, he should apply to the court, on affidavit, for leave to enter into the consent rule, specially stipulating to confess *lease* and *entry* only, not *ouster*, unless an actual ouster of the lessors should be proved at the trial. *Jackson, ex dem. Jones, v. Lyons,* 398

VI. *Judgment, writ of possession, and mesne profits.*

19. Where the title of the lessor, being a *life estate* only, ends before the trial of the cause, the plaintiff, though he cannot turn the defendant out of possession, is entitled to judgment, so as to enable him to recover the *mesne profits*; but with a perpetual stay of the writ of possession. *Jackson, ex dem. Henderson, v. Davenport* 295

20. Where ejectment was brought by one tenant in common, against his co-tenant, and the consent rule for the undivided moiety was entered into in the common form, and the plaintiff proved title to an undivided moiety only: *Held*, that the defendant was entitled to judgment, as to the one moiety, though as to the other the plaintiff was entitled to judgment by default. *Jackson, ex dem Jones, v. Lyons,* 398

ELECTION.

Of cause of action, *Vide* ASSUMPSIT.

ERROR.

1. The act relative to writs of error, on judgments of the Courts of Common Pleas, passed April 5th, 1817, sess. 40. ch. 179. is not retrospective, but prospective merely. *Watkins v. Haight,* 138
2. On filing a writ of error and return, in this court, the defendant in error, instead of issuing a *scire facias quare executionem non*, enters a rule that the plaintiff in error assign errors in twenty days, or that his default be entered; and serves a *notice* on the plaintiff in error, as his attorney, that the writ of error has been returned and filed, and that a rule has thereupon been entered, that the plaintiff in error assign errors, &c. *Burr v. Waterman,* 508

ESTATE.

Vide DEVISE. .

ESCAPE.

1. A sheriff, having a defendant in custody on a *ca. sa.*, is bound to obey a writ of *habeas corpus ad testificandum*, according to the exigency of the case; and if, in doing so, he takes his prisoner out of his county, and returns with him again, without unnecessary delay, it is not an *escape*. *Hassam v. Griffin,* 48
2. While the sheriff so has the prison-

er on the *habeas corpus*, he is not bound to keep him always in his sight, or with the same strictness as before; and if the prisoner, of his own head, should go about, for a short time, on his own business, out of view of the sheriff, it is not an escape. *ib.*

3. An action against the sheriff, for an *escape* of a prisoner in execution, from the liberties of the gaol, is not well commenced by handing a writ to a person, with directions to go and see the prisoner off the limits, and then to deliver the writ to the coroner. *Visscher v. Gansevoort*, 496
4. The writ must be actually delivered to the coroner, or left at his office, or be issued and sent to him, with the absolute, positive, and unequivocal intention to commence the suit while the prisoner is off the limits. *ib.*
5. To support an action for an escape, the fact of the prisoner being beyond the limits of the jail liberties, must be affirmatively and satisfactorily shown, by direct and positive proof. Nothing will be intended or inferred. *ib.*

ESCROW.

Vide DEED.

ESTOPPEL.

1. An instrument not under seal, cannot be pleaded by way of estoppel. *Davis v. Tyler*, 490
2. The form of pleading an estoppel, is to rely on the deed, as an estoppel, and pray judgment that the party be estopped, or not admitted to deny the facts in the deed; not to demand judgment, *si actio*, &c. *ib.*

EVIDENCE.

- I. *Matters of record and legal proceedings.*
- II. *Legal proceedings of other courts.*
- III. *Deeds.*
- IV. *Other private writings.*

V. *Proof of hand-writing and subscribing witnesses.*

VI. *Presumptions.*

VII. *What may be proved by parol.*

VIII. *Confessions and declarations.*

IX. *Hearsay and general reputation.*

X. *Witnesses; when competent or incompetent, and how examined.*

I. *Matters of record and legal proceedings.*

1. A verdict, and judgment thereon, to be evidence, must be on the same point, and between the same parties or privies. *Maybee v. Avery*, 352
2. Where the matter in dispute is a question of public right, all persons standing in the same situation are affected by it. As, where the public is a party aggrieved, and the prosecution is carried on, through their officers, any individual may avail himself of the *conviction*. *ib.*
3. Therefore, in an action of slander, for saying of the plaintiff, he was a thief, and stole the defendant's hens, a record of conviction of the plaintiff, before a court of Special Sessions, for stealing the defendant's hens, is admissible evidence, under notice or plea of justification, by the defendant, of the truth of the words spoken. *ib.*
4. The verdict of conviction, in such case, is, however, only *prima facie* evidence; and the plaintiff, therefore, is allowed to disprove the fact, and give evidence of the falsity of the proof on which the conviction was founded. *ib.*
5. But the conviction cannot be received in evidence at all, if the defendant in the civil suit, and the party aggrieved, was a witness in the criminal prosecution. *ib.*

II. *Legal proceedings of other courts.*

6. Exemplifications of the proceedings in the court of another state or county, between the same parties for the same cause of action, are not admissible in evidence under

the general issue ; but the pendency of another suit, for the same matter, should be pleaded in abatement. *Percival v. Hickey*, 257

III. Deeds.

Vide DEED.

IV. Other private writings.

7. *It seems*, that a copy of a letter, which the witness swore was a true copy of the original copy in the plaintiff's letter book, made by him, at the time, from the original letter put by him in the post-office, is admissible, after notice had been given to the defendant to produce the original letter. *Robertson v. Lynch*, 451

V. Proof of hand-writing and subscribing witnesses.

- 8 Though a subscribing witness to a deed or sealed instrument, if within the jurisdiction of the court, must be called to prove its execution and delivery ; yet the fact of a *rasure* of a deed may be proved by any other person. *Penny v. Corwithe*, 599

VI. Presumptions.

9. Where a married man sailed in a vessel from *New-York*, on a voyage to *South America*, and neither he nor the vessel had ever been heard of since ; this was held to be sufficient evidence of his death, on a plea of *coverture*, in an action brought against the wife, as a *feme sole*, twelve years after the departure of her husband. *King v. Paddock*, 141

VII. What may be proved by parol.

10. In regard to the proof of the loss of an instrument, so as to excuse its non-production, there is a distinction between such papers as have ceased to be of any value, or any evidence of title, and such as are *muniments* of title ; as to the

first, the slightest proof of loss, and even presumption of loss from lapse of time, is sufficient to entitle the party to give parol evidence of their contents ; but as to the latter, the rule of evidence is more strict. *Jackson, ex dem. Bond and others, v. Root*, 60

11. Where there were two subscribing witnesses to a paper, one of whom was proved to be dead, and the other living within the state, but too aged and infirm to attend the trial, proof of his hand-writing was held to be inadmissible ; his examination under oath, taken under the order of the court, or under the statute, being better evidence. *ib.*
12. In an action by the master of a ship for his wages, against the defendant, as owner, who held an absolute bill of sale from *M.*, and, also, a register of the ship in his own name, the defendant may prove, by parol, that the bill of sale was given to him merely by way of collateral security, or mortgage. *Champlin v. Butler*, 169

Vide BOND, I.

VIII. Confessions and declarations.

13. A declaration or confession by one of the lessors in ejectment, is evidence against all of them. *Jackson, ex dem. Neilson, v. M^r Vey*, 330

IX. Hearsay and general reputation.

14. Though *hearsay* and reputation may be received as evidence to prove *pedigree*, yet, where the witnesses are not connected with the family, have no personal knowledge of the facts of which they speak, and have not derived their information from persons connected, or particularly acquainted with the family, but speak generally, of what they have heard and understood, such evidence is insufficient for that purpose. *Jackson, ex dem. Garland, v. Browner*, 37

X. Witness ; when competent or incompetent ; and how examined.

15. A grantor who has given a deed with full covenants, is a competent witness for a defendant deriving title under him, though not as his immediate grantee, on being released by the defendant ; for the release prevents the defendant from resorting to him, or his immediate grantee, in case a verdict should be found for the plaintiff. *Jackson, ex dem. Bond, v. Root,* 60
16. A person who does not believe in the existence of a God, nor in a state of future rewards and punishments, cannot be a witness in a court of justice, under any circumstances. *Jackson, ex dem. Tuttle, v. Gridley,* 98
17. Where it was proved, that a person offered as a witness had, within three months before the trial, often, deliberately and publicly, declared his disbelief in the existence of a God, and a future state of rewards and punishments, he cannot, on being called to be sworn and objected to, be admitted to deny those declarations, or to state his recantation of them, and his present belief in a God, &c. *ib.*
18. But a witness may be restored to his competency, on giving satisfactory evidence of a change of mind, some time before the trial, so as to repel the presumption arising from his former declarations of infidelity, existing at the time he is called to be sworn. *ib.*
19. Though *infants* may be examined as to their religious knowledge and belief, it is merely to test their capacity to give evidence, or their understanding of the nature and obligation of an oath. *ib.*
20. But an *adult* of sound mind, when called as a witness, and objected to as an infidel, is not to be questioned as to his religious creed. *ib.*
21. The plaintiff requested the defendants and *R.*, to lend him their names for 2,000 dollars ; and it was agreed, that *R.* should make a promissory note for that sum, payable to the defendants, to be endorsed by them, and the defendants, accordingly, endorsed a blank paper, which the plaintiff, without the privity or consent of the endorsers, procured *R.* to fill up with a note for 4,000 dollars ; *Held*, that *D.*, a subsequent endorser, and *R.*, the *maker*, were competent witnesses to prove the fraud in filling up the note. *Myers v. Palmer,* 107
22. Where two persons are jointly concerned in a contract of sale, their interest may be severed by a parol agreement, on good consideration ; and one of them, after the severance, is a competent witness for the other, in relation to a matter growing out of such contract ; he having parted with all his interest in the contract. *Smith v. Allen,* 245
23. Under the *last general interrogatory* annexed to a commission to take the examination of witnesses abroad, the witness, in his answer, may state facts not drawn forth by the previous particular interrogatories. *Percival v. Hickey,* 257
24. An attorney or counsel of the plaintiff, or defendant, may be compelled to testify whether a deed described by the adverse party, is in his possession or not, so as to authorize the other party, on his refusing to produce it, after notice for that purpose, to give *parol* evidence of its contents. *Jackson, ex dem. Neilson, v. M^r Vey,* 330
25. The evidence of a witness called to prove the contents of a deed which the adverse party has in his possession, and has refused to produce, after notice for that purpose, is not to be rejected, because the witness, though he had often perused the deed, was unable to recollect any of the *courses* stated in the description of the premises contained in it ; the object of the inquiry being to show, that the premises in question were included

in such deed, and by not producing the deed, when called for, a strong presumption arises against the party, that it does contain the premises as testified by the witness. *ib.*

26. *It seems*, that a clerk, who has sent goods and made the entries in the plaintiff's books, may be allowed to refresh his memory as to the quantity and quality of the goods, from an extract made by him, from the original entries. *Robertson v. Lynch*, 451

EXECUTION.

- I. *When, and in what order, executions may be issued.*
 II. *Fieri facias; what may be sold under it. Levy and sale, &c.*

- I. *When, and in what order, executions may be issued.*

1. Where several defendants are arrested on a *capias ad respondendum*, at the suit of the plaintiff, in several counties, and all put in special bail; and the plaintiff issues a *fi. fa.* against all the defendants, to the sheriff of the county in which one of them only was arrested, which is returned *nulla bona*, &c. and thereupon a *ca. sa.* is issued against all the defendants, directed to the sheriff of a different county, in which none of the defendants were arrested; and one of the defendants, who had been arrested in another county, into which no *fi. fa.* had been issued, is taken on the *ca. sa.*, it is irregular, not being pursuant to the provisions of the *art concerning judgments and executions*, sess. 38. ch. 59. s. 7. (1 *N. R. L.* 500.) and the defendant, so taken in execution, may be discharged on motion. *United States Bank v. Jenkins*, 305

- II. *Fieri facias; what may be sold under it. Levy and sale, &c.*

2. A person in possession of land, under a contract for the purchase and sale of it, has an interest in

the land, which may be sold on execution. *Jackson, ex dem. Stone, v. Scott*, 94

3. The defendant, in such case, becomes *quasi* tenant to the purchaser, and cannot object that he has no title. *ib.*
 4. The goods of the debtor are bound by the delivery of the execution to the sheriff, and the creditor acquires a *lien*, of which he cannot be deprived by the act of the debtor; and if the goods, before an actual levy and sale, are removed by the debtor out of the bailiwick of the sheriff into another county, and are there taken and sold under an execution subsequently issued, though the *bona fide* purchaser, at such sale, acquires a valid title to the goods; yet the *proceeds* in the hands of the sheriff will be ordered to be paid to the plaintiff in the first execution, to the amount of his debt, leaving the residue, if any, to the plaintiff in the second execution. *Lambert v. Paulding*, 311
 5. Where the real estate of a debtor consists of a lot of land, divided into separate farms, occupied by several and distinct tenants, the sheriff cannot sell the whole together, under the general description of a lot of land of a certain number, without any specification of the parcels occupied as separate farms, &c. And if he does so, the court, on motion, will set aside the sale. *Jackson, ex dem. Vanderlyn, v. Newton*, 355
 6. The goods of the debtor are bound, by the delivery of the execution to the sheriff, whether they are levied on or not, and a subsequent sale of them, by the debtor, is void. *Beals v. Allen*, 363
 7. When two several executions are delivered to a sheriff, at different times, at the suit of different plaintiffs against the same defendant, and the sheriff takes and sells the goods of the defendant, and applies the proceeds in satisfaction of the last execution, leaving the other

unsatisfied, though he is accountable to the plaintiff in the first execution, for having so sold and misapplied the property to the last execution; yet, a third creditor, who had got possession of the goods subsequent to the delivery of the first execution, but prior to the second, cannot avail himself of the act of the sheriff in selling under the last, instead of the first execution, or call in question the regularity of the sale. *ib.*

8. The act, in addition to an act relative to executions, passed April 18, 1815, (sess. 38. c. 227.) exempting from execution, and distress for rent, *one cow*, &c. owned by any person "being a householder," was intended for the benefit of *poor families*; and the father and husband, or head of the family, who has left the state, leaving his wife and children living together, is a "householder" within the meaning of the act. *Woodward v. Murray*, 400
9. The *family* of *M.* were in the act of removing to the house of another, and while on the road, in a wagon, their household furniture, and an only *cow*, were seized by virtue of an execution, and the *cow* taken and sold; *Held*, that the wife and children, being together, were still the *family* of *M.*, and that the *cow* was exempted from the execution. *ib.*
10. The consent of the wife, that a *cow* or a bed might be taken and sold on the execution, on the officer releasing to her other articles not exempted by law, is not valid or binding, without special authority from her husband. *ib.*
11. Where the maker of a promissory note, protested for non-payment, confessed a judgment in favor of the endorser, for his security; and the holders, who had previously sued the maker, afterwards recovered judgment against him, and executions on both judgments were in the hands of the sheriff, though

the execution on the judgment in favor of the endorser was first delivered; the court, on motion of the holders, plaintiffs in the second suit, ordered the sheriff, out of moneys arising from the sale by him of the defendant's property, first to pay and satisfy the second execution, in favor of the holders of the note. *Bank of Auburn v. Throop*, 505

Vide SHERIFF. RENT.

EXECUTORS AND ADMINISTRATORS.

When personally liable.

Where an executor or administrator pleads a false plea, the judgment is *de bonis testatoris, si non, de bonis propriis*, &c.; and, under the statute, if sufficient goods and chattels cannot be found, then of the *lands and tenements*, &c. *Lansing v. Lansing*, 502

EXECUTORY DEVISE.

Vide DEVISE.

F.

FACTOR.

Where *M.*, a merchant abroad, consigned goods to *T.*, for sale, on his account, and *T.* sent the goods to the defendants, for sale: *Held*, that the defendants were bound to account to *T.* for the proceeds, as their principal, and could not retain them, to satisfy a demand of their own against him; and that *T.* might maintain an action against the defendants, in his own name. *Toland v. Murray*, 504.

FEME COVERT.

Vide BARON AND FEME.

FORFEITURE.

Vide LEASE.

FORGERY.

Forging a deed, within this state, for lands lying in the *Missouri* territory, or in another state, is an offence indictable and punishable under the acts to *prevent forgery*, and declaring the punishment of crimes. *The People v. Flanders*, 164

FRAUD.

- 1 Where mortgaged premises were put up for sale at public auction, pursuant to advertisement and notice given, by virtue of a power of sale contained in the mortgage, and the assignee of the mortgagee, acting as auctioneer, while the premises were up, on seeing the defendant, who had purchased under the mortgage, approaching the place of sale, immediately knocked down the premises, for half the sum due on the mortgage, to his brother, as the highest bidder, so as to prevent competition: *Held*, that the sale was fraudulent and void, and that the purchaser, to whom a deed had been executed, acquired no title under it. *Jackson, ex dem. Bowers, v. Crafts*, 110
 2. Courts of law have concurrent jurisdiction with the Court of Chancery in cases of fraud. *Fleming v. Slocum*, 403
 3. Where a vendor of a chattel is guilty of a fraudulent concealment of material facts in relation to the sale, to the injury of the vendee, an action at law is maintainable, to recover damages. *ib.*
 4. But the fraud must be proved, and cannot be presumed. *ib.*
- Fraud in the Sale of Chattels, *vide* SALE OF GOODS AND CHATTELS.

FRAUDS (STATUTE OF.)

Fraudulent Sales and Conveyances.

1. The plaintiff was endorser of a promissory note, made by *B.*, for his accommodation; and *B.*, who was also indebted to the plaintiff, having a sum of money and goods,

with which he was ready to pay the note, and to secure the plaintiff; it was agreed between the plaintiff, *B.*, and the defendant, that *B.* should place the money and goods in the hands of the defendant, who should pay the note and debt due to the plaintiff, and indemnify the plaintiff against the note, &c. *B.*, accordingly, delivered the money and goods to the defendant, who, thereupon, undertook and promised to pay the note, &c. *Held*, that this was not a promise or undertaking for the debt or default of another, within the statute of frauds. *Olmstead v. Greenly*, 12

2. The statute of frauds (s. 15.) applies to *executory* as well as to other contracts; but it must distinctly appear that the value of the goods sold was above *twenty-five* dollars. *Crookshank v. Burrell*, 58
3. A contract to deliver, at a future day, a thing not then existing, but yet to be made, is not within the statute; for it is a contract for *work and labor*, not for the sale and purchase of goods. *ib.*
4. As where the plaintiff contracted to make a wagon for the defendant, by a certain day, and that he should come and pay for it, in lambs, at a certain price per head; this was held to be a contract for work and labor, and not within the statute. *ib.*
5. A conveyance made with intent to defeat the recovery by a third person for damages, in an action pending against the grantor, for a *tort*, and before trial and judgment, is fraudulent and void, within the statute, sess. 10. ch. 44. s. 2. 425
6. The *proviso* in the *sixth* section of the act applies both to the *second* and *third* sections, or 13 *Eliz.* ch. 5., and 27 *Eliz.* ch. 4.; and that whether the conveyance is from the fraudulent grantor or fraudulent grantee. *Anderson v. Roberts, in error*, 515
7. The same rule of construction is to be applied to both sections, (*second*

- and *third*) or statutes, (13 *Eliz.* ch. 5., and 27 *Eliz.* ch. 4.) *ib.*
8. And there is, therefore, no difference between a deed to defraud creditors, and a deed to defraud subsequent purchasers. *ib.*
 9. A *bona fide* purchaser, therefore, for a valuable consideration, without notice of the fraud, whether he purchases from the fraudulent grantor or the fraudulent grantee, is protected by the proviso in the statute; such fraudulent conveyance not being absolutely void, but voidable only at the instance of the party aggrieved. *ib.*
 10. The purchaser from the fraudulent grantee, however, must be prior in time to the purchaser from the fraudulent grantor, or to a sale on execution, at the suit of the creditor. *ib.*
 3. The right to retain goods for the freight, grows out of the usage of trade, and does not exist, where the parties have, by their agreement, regulated the time and manner of paying the freight; especially where the cargo is to be delivered before the time fixed for the payment of the freight. *Chandler v. Belden*, 157
 4. The legal property in goods passes by a bill of lading, and an assignment thereof, *bona fide*, and for a fair consideration, though the assignment be made after the arrival of the goods in port. *ib.*
 5. And where the ship owner, not having a lien for the freight, sold the goods at auction, to pay freight, it was held to be a conversion of them, and that trover would lie at the suit of the person to whom the bill of lading was assigned. *ib.*

FREIGHT AND CHARTER PARTY.

1. A hostile investment or blockade of the port of departure does not dissolve a contract of charter party; and the master or owner of the vessel has a right to retain the goods, until he can prosecute the voyage with safety, or the freighter tenders the whole freight and demands his goods. *Ogden v. Barker*, 87
2. Where a contract of affreightment, or charter party, was executed by the plaintiff and defendant, under their seals, for the transportation of goods from a port in *Virginia* to *Cadiz*; and the parties on the same day, (*January* 26, 1813,) made an agreement on a separate paper, not under seal, referring to the charter party executed by them, and stipulating that the owners of the vessels should have on board a *Sidmouth license*, for the protection of the ship and cargo: *Held*, that these were several and distinct contracts; and the supplementary agreement being illegal, did not affect or vitiate the charter party, which remained valid and binding. *ib.*

Vide INSURANCE.

G.

GAOL LIBERTIES.

Vide ESCAPE. PRACTICE, I.

GIFT.

- A father, from affection merely, gave to his son a promissory note, for 1,000 dollars, payable to him or order, *sixty* days after date. In an action brought by the son against the executor of his father, to recover the amount of the note, it was *held*, that the action could not be maintained; for it was not a *donatio mortis causa*, nor a gift of so much *money*, but a mere promise to give; and *blood* or natural affection is not a sufficient *consideration*, to support a simple executory contract. *Fink v. Cox, Executor*, &c. 145

H.

HABEAS CORPUS.

- Though this court has power, at common law, to relieve against all illegal

imprisonments, in civil or criminal cases; yet an *habeas corpus* is not the proper remedy for a defendant imprisoned on a *ca. sa.* irregularly issued before a previous *fi. fa.* according to the provisions of the act; (Sess. 36. ch. 50. s. 7.) but the party may be discharged, on motion and affidavit for that purpose.
United States Bank v. Jenkins, 305

Habeas corpus ad testificandum. Vide
 ESCAPE.

Habeas corpus to remove a cause. Vide
 PRACTICE, VI.

I.

INDIANS.

The court refused to grant an attachment for costs, on a judgment of nonsuit against an *Oneida Indian*, lessor of the plaintiff, in an action of ejectment; but granted a rule on the attorney who brought the suit, not being the agent or attorney appointed by the state to manage the affairs of the Indians, to show cause why an attachment should not issue against him for the costs.
Jackson, ex dem. Dackstader, v. King and Neilson, 506

INSOLVENT DEBTOR.

1. Though a discharge under the insolvent act of this state, so far as it attempts to discharge the party from a contract made previous to passing the act, is unconstitutional and void; yet the defendant may avail himself of the discharge to protect his *person* from imprisonment. *Post v. Riley*, 54
2. But the insolvent, for that purpose, must plead the discharge specially; and if he neglects to do so, and suffers judgment to pass against him, his *bail* cannot be relieved, on motion, on the ground of the discharge of the principal. *ib.*
3. Where a defendant obtains his discharge under the insolvent act, after a declaration in a suit against him has been filed, he ought to

plead his discharge, at or before the next term; or, at least, before a default has been, afterwards, entered for want of a plea: and if he neglect to do so, he will not be allowed, after a judgment has been perfected, to plead his discharge *nunc pro tunc.* *Desobry v. Morange*, 336

Vide PLEADING, V.

INSURANCE.

Abandonment.

Insurance on *freight* from *Archangel* to *New-York*. During the voyage, the ship became so shattered and disabled by storms, that she was compelled to seek a port for safety, and put into the *Helder*, being a port of necessity. On a survey, she was found to be so damaged, as to be unseaworthy, and incapable of being repaired, unless at an expense far exceeding half her value: and though another vessel might easily have been procured at *Amsterdam*, at a moderate freight, to carry an ordinary cargo to *New-York*, yet the *hemp*, of which her cargo chiefly consisted, being so much wet and damaged as to render it unfit, if not dangerous, to be re-shipped in another vessel, even if any master would have been willing to carry it in such a state; the voyage was, therefore, broken up, and the vessel and cargo sold at the *Helder*, for the benefit of all concerned; and the insured abandoned for a total loss: *Held*, that the assured had a right to abandon, and to recover for a total loss, deducting freight, *pro rata itineris*, from *Archangel* to the *Helder.* *Whitney v. New-York Firemen Insurance Company*, 208

Vide SET-OFF.

J.

JOINT DEBTORS.

- 1 Joint debtors must be sued jointly.
Robertson v. Smith, 459

2. If all of them are not sued, it must be pleaded in abatement. *ib.*
3. In a suit against joint debtors, a joint and subsisting indebtedness in *all* the defendants must be shown. *ib.*
4. And, in *assumpsit*, it is necessary to show a subsisting liability on the part of *all* the defendants; except in the cases of infancy, death, or discharge of one of the defendants under a bankrupt or insolvent act. *ib.*
5. Where, in respect of any of the defendants, the right of action is gone, or suspended, their *joint* liability being at an end, the other defendants may avail themselves of this suspension or discharge, whether it be produced by the act of the party, or by the operation of law, at the instance, and by the agency, of the plaintiff. *ib.*
6. Thus, where the plaintiff brought an action of *assumpsit* against *S.* and *S.*, as partners, under the firm of *S. and S. and Company*, and makers of a promissory note, and recovered a judgment, which was unsatisfied; and afterwards, discovering that *P.* and *V.* were, also, partners in the firm at the time the note was given, he brought an action against the four, as makers of the same note: *Held*, that the judgment, recovered against two of the defendants on the note, was a bar to the subsequent suit against the four defendants, for the same cause of action. *ib.*

JURISDICTION.

- A court of common law has concurrent jurisdiction with the *instance* court of admiralty of a *marine tort*.
Percival v. Hickey, 257

Vide TRESPASS.

JURY.

Vide NEW TRIAL, II.

L.

LANDLORD AND TENANT.

1. If a tenant does an act proper in
462

itself, he cannot be made a wrong doer, by a consequence which he could not anticipate. *Jackson, ex dem. Van Rensselaer, v. Andrew*, 431

2. As, if by turning the water of a creek, being an act of good husbandry, by causing the water to flow into a swamp, the timber growing there is killed, it is not to be deemed *waste*, so as to produce a forfeiture of his lease, especially where the landlord has lain by for twenty years, during which time new trees had grown up, of more value than the old, and, therefore, no permanent injury had been done to the inheritance. *ib.*

Vide RENT. LEASE.

LEASE.

1. A covenant or condition, in a lease to a person, his heirs and assigns, for ever, *yielding* and paying a certain yearly rent, &c. that in case the lessee, or his heirs, &c. should be minded to dispose of the premises, or any part thereof, he should give to the lessor, or his heirs, &c. the right of pre-emption or refusal of buying, and would not sell, without his leave, under his hand and seal, first obtained; and that on every such sale, with such license, should pay to the lessor *one tenth* of the money for which the premises were sold; and that in case the lessee did not keep and perform all the conditions, &c. the lease and the estate demised should cease and be void, is a lawful and valid covenant or condition: and there being a clause of re-entry for a breach of the covenants, the lessor may bring ejectment to recover the possession of the premises on the forfeiture. *Jackson, ex dem. Lewis and wife, v. Schutz*, 174
2. The estate of the lessee, under such a lease, is a *fee simple conditional*, at common law, or a fee simple, subject to be defeated, upon a condition subsequent. *Per Platt, J., S. C.* 184

3. And if the condition had been *absolute* not to aliene, it would have been repugnant to the grant, and therefore void. *ib.*
4. Where a lessor proceeds for a forfeiture, or to enforce a penalty, he must show a demand of the rent on the very day on which it was payable. *Remsen v. Conklin*, 447
5. But where the rent is payable on the land, and he brings an action of covenant, or proceeds by distress, to recover the rent, he need not show a previous demand, although the rent was payable on demand. *ib.*
6. And it is a good defence for the tenant, that he was ready on the land to pay, but that the lessor was not there ready to receive the rent. *ib.*
7. But if the rent is payable at a place off the land, and there is a clause of distress, in case the rent, being lawfully demanded at such place, is in arrear, the lessor cannot distrain without a previous demand of the rent. *ib.*
8. In a lease of land, in the county of *Oneida*, the rent was reserved in wheat, to be delivered, annually, at such place in the city of *Albany* as the lessor should appoint: *Held*, in an action of covenant for arrears of rent, that it was the duty of the lessor to appoint a place in *Albany*, and give notice thereof to the lessee; and that, in default of such appointment and notice, the rent was payable on the land; and, therefore, the lessee should plead a tender, or that he was ready, on the land, to deliver the wheat, &c. *ib.*

LEGACY.

1. No action at law lies for a legacy. *Pelletreau v. Rathbone*, 428
2. Though an annuity for life is expressly charged on the real and personal estate of the testator, an action at law cannot be maintained against the heirs or terre-tenants. *ib.*
3. The proper remedy is in the Court of Chancery. *ib.*

LIEN.

Vide EXECUTION.

LIMITATION.

1. A party claiming the benefit of the *proviso* in the statute of limitations, can only avail himself of a disability existing when the right of action accrued. *Jackson, ex dem. Roosevelt, v. Wheat*, 40
2. The *People*, not being named in the *fifth* section of "the act for the limitation of criminal prosecutions and of actions at law," sess. 24. c. 183. (1 *N. R. L.* 184.) are not bound by it, and may bring a personal action at any time. *People v. Gilbert*, 227

Vide ONONDAGA COMMISSIONERS. ACTION.

LUNATIC.

A defendant *non compos mentis*, but of full age, and not an idiot from nativity, may appear by attorney; and the court, on motion, will appoint an attorney for him. *Faulkner v. McClure*, 134

M.

MANDAMUS.

When and to whom it lies.

A *mandamus* lies to the *supervisors* of a county, to compel them to allow the account of the clerk of the county, for advances made by him in purchasing *books for recording deeds, mortgages, &c.*, and for sending *notices* to judges and justices of the peace, of *peddlars* who were licensed, with interest on such advances; such services being required by law of the clerks, and no specific compensation provided for them, are properly chargeable to the county, and ought, therefore, to be allowed and paid according to the act for defraying the public and necessary charges in the respective counties, &c. Sess. 36

ch. 49. sec. 1. 2 *N. R. L.* 137.)
Bright v. Supervisors of Chenango,
 242

MARRIAGE.

Vide **BARON AND FEME.**

MASTERS AND OWNERS OF VESSELS.

1. A mortgagee of a ship in possession is liable to the master for his wages, if the voyage be performed for the benefit of the mortgagee. *Champlin v. Butler,* 169
2. But where the master made a special agreement, as to his wages, with *M.*, the real owner or mortgagor, and with full knowledge of a secret agreement between *M.* and the defendant, who had no interest in the voyage, but merely lent his name to cover the voyage for the benefit of *M.*, and without receiving any freight or profit: *Held*, that the plaintiff was bound by his special agreement, and could not waive it, and sue the defendant as owner. *ib.*
3. In an action by the master of a ship for his wages, against the defendant, as owner, and who held an absolute bill of sale from *M.*, as well as a register of the ship, in his own name, the defendant may prove by parol, that the bill of sale was given to him merely as collateral security, by way of mortgage. *ib.*

MILITARY BOUNTY LANDS.

K., a soldier entitled to bounty lands, by a deed dated *January* 12th, 1788, granted, bargained and sold, for a valuable consideration, to *B.*, all the bounty lands to which he was entitled, and in the same deed, empowered *A.*, as his attorney, for him, and in his name, to grant, bargain, and convey the same to *B.*, his heirs and assigns, in case the same should be necessary, upon the grants having passed the great seal of the state, for such bounty lands. On the 25th *February*, 1792, *K.*, for a valuable consideration, by deed, granted, bargained,

and conveyed the same bounty lands to *C.*, his heirs and assigns, for ever: and on the 9th *February*, 1802, *A.*, as the attorney of *K.*, in his name, executed a release, for the same lands, to *B.* in fee, pursuant to the power contained in the first deed: *Held*, that the deed from *K.* to *B.* conveyed an estate for life only; and that *K.*, having conveyed to *C.* all his reversionary interest, before the execution of the power given to *A.*, *C.*, as a bona fide purchaser, without notice, became seized of the legal estate in the premises on the death of *B.* *Jackson, ex dem. Henderson, v. Davenport,* 295

Vide **ONONDAGA COMMISSIONERS.**

MORTGAGE.

1. Where a mortgage is paid off and satisfied, no release is necessary to reconvey the title to the mortgagor. *Jackson v. Davis,* 7
2. Therefore, a recital, in another deed, of a mortgage, is not evidence of its existence, as an outstanding mortgage. *ib.*
3. If a legal tender is made of the money due on a bond and mortgage to the mortgagee, or his assignee or attorney, which is refused, the land is discharged from the mortgage, though the debt remains. *Jackson, ex dem. Bowers, v. Crafts,* 110
4. The assignee of a bond and mortgage having put them into the hands of his attorney for foreclosure, afterwards told the attorney not to receive the money due, if it was tendered, nor do any thing further about it, as he would attend to the business himself; proceedings for a sale under the power contained in the mortgage having been commenced, a purchaser under the mortgagor, on the day before the sale at auction was to take place, tendered the principal and interest due, and the costs of the proceedings, to the attorney, in whose hands the bond and mortgage then

were, and he refused to receive the money, assigning the instructions of his client as the reason for his refusal: *Held*, that this was a good tender to the principal. *ib.*

5. When a mortgage, given to secure a debt of 3,000 dollars, was, by mistake, registered for 300 dollars only, it was held to be notice to a subsequent *bona fide* purchaser, to the extent only of the sum expressed in the registry. *Beekman v. Frost*, 544

Mortgage of a ship, *vide* MASTERS AND OWNERS OF SHIPS.

Vide CHANCERY. DEED. FRAUDS. EJECTMENT.

N.

NEW TRIAL.

- I. *When a new trial will be granted, on the ground of newly discovered evidence.*
- II. *New trial in criminal cases.*
- I. *When a new trial will be granted on the ground of newly discovered evidence.*
1. A new trial will not be granted, on the ground of newly discovered evidence, if it appear, that the evidence might, with reasonable attention and diligence, have been procured before the first trial. *Williams v. Baldwin*, 489
2. It seems, that on a motion for a new trial on the ground of newly discovered evidence, it is competent to the adverse party to show, by affidavit, that the witness, whose testimony is stated to be material, and newly discovered, is wholly unworthy of credit. *ib.*

II. *In criminal cases.*

3. In cases of *felony*, as well as of *misdemeanor*, if the jury, after deliberating so long on the prisoner's case as to preclude a reasonable expectation that they will ever agree on their verdict, unless com-

pelled to do so by famine and exhaustion, they may be discharged, and the prisoner be again tried by another jury. *The People v Goodwin*, 187

4. As, where, on an indictment for *manslaughter*, the jury, after a trial of five days, and after being kept together, to consider of their verdict, for *seventeen* hours, declared that there was no probability of their agreeing on a verdict; and it being within half an hour of the time when the court was bound by law to close its session, the jury were discharged, and the prisoner was again tried at another court. *ib.*
5. The new trial, where the prisoner, after being tried in the Court of Sessions, is brought to this court on *habeas corpus* and *certiorari*, may be before the Court of *Oyer and Terminer* and *Gaol Delivery*, or at the next *Sittings* in *New-York* or *Albany*, under the act, sess. 36. ch. 66. *ib.*
6. Where a prisoner was tried at a *Court of Oyer and Terminer* and *Gaol Delivery* for murder, and convicted, without a *venire* returned and filed, (the paper purporting to be a *venire* not having the seal of the court,) it was held to be error, and judgment was arrested, and a new trial awarded. *People v. McKay*, 212
7. Where a prisoner who has been tried and found guilty, and judgment is arrested, on his motion, and in his favor, a new trial may be awarded. *ib.*

NEW-YORK, CITY OF.

Before an appointment of commissioners of estimate and assessment, for opening, enlarging, &c. of streets in the city of *New-York*, under the act, sess. 36. ch. 86. § 177, &c. (2 *N. R. L.* 342. 408. 413.) the court, on petition of the corporation for that purpose, will order all further proceedings to be discontinued. *Corporation of the City of New-York*, 465

in the matter of enlarging, &c.
Dover Street, &c. 506

O.

OFFICE AND OFFICER.

1. Where a public office is instituted by the legislature, an implied authority is conferred on the officer, to bring all suits, as incident to his office, which the proper and faithful discharge of his official duties requires. *Overseers of Pittstown v. Overseers of Plattsburgh*, 407
2. Thus, the *overseers of the poor*, being the public agents and trustees of the town, in respect to the poor, have, without any express authority from the legislature for that purpose, a capacity to sue co-extensive with their public trusts and duties. *ib.*
3. Where a public agent or officer acts ostensibly in the line of his official duty, his contracts are public, not personal. *Olney v. Wickes*, 122
4. *It seems*, that an express promise to pay, does not establish the criterion of personal responsibility. *ib.*
5. And where the transaction shows the engagement to be on account of the public, it is not necessary, in order to avoid personal liability, that the officer should expressly say, that he acts in his official capacity. *ib.*
6. As where an *overseer of the poor* of a town contracted with the plaintiff for the support of a pauper, for which he agreed to pay a certain sum per week, he was held not to be *personally* responsible on the contract; as, from the facts and circumstances of the case, it did not appear that he intended to bind himself personally. *ib.*

ONONDAGA COMMISSIONERS.

1. An *award* of the *Onondaga commissioners* was made in favor of the defendant, *November 5th*, 1800, to which the plaintiff filed a *dissent*, according to the act, in *February*, 466

1801; and it appeared that the defendant was in actual possession in *June*, 1801: *Held*, that though the possession commenced after the award and dissent, but before the expiration of three years; yet the party filing his dissent was bound to take notice of the possession, and to bring his action against the party in possession, within the three years; and prosecute the same to effect, within three years, otherwise, the award was conclusive. *Jackson, ex dem. Bond, v. Root*, 60

2. If the party in whose favor the award is made, is out of possession, and his adversary in possession, the party out of possession must bring his action, and prosecute it to effect, within three years; and if he does so, his title is established, and the recovery is conclusive on the right. *ib.*
3. And it is the same, if the party dissenting should bring a suit against a tenant in possession, claiming under the party in whose favor the award was made, if a verdict, after trial as to the right, is found for the defendant; for the intention of the legislature, in regard to these military lands, was, to make a single trial as to the right, in an action of ejectment brought within the time limited, a conclusive bar to another suit; and if there is a trial on the merits, in a suit brought by either party, within the period prescribed, it is within the true meaning and intent of the act. *ib.*
4. Where a *soldier* endorsed a conveyance on his discharge, in which he described the premises, as follows: "The six hundred acres of land due me from the public, as a soldier in Col. *Lamb's* regiment of artillery;" when, in fact, he was not a soldier in that regiment, but in the first, or *Van Schaick's* regiment: *Held*, that the description was sufficient without the words, "in Col. *Lamb's* regiment," which might be rejected as surplusage. *ib.*

ORDERS OF REMOVAL.

Of the poor, *vide* **POOR.**

OVERSEERS OF THE POOR.

Vide **POOR.** **OFFICE AND OFFICER.**

OUTLAWRY.

Vide **PRACTICE, II.**

P.

PARTNERSHIP.

- 1 After a trial, and verdict for the plaintiff, it is too late for the defendant to object that the subject matter of the suit was a co-partnership contract between him and the plaintiff. The objection must be made at the trial. *Smith v. Allen,* 45
2. Where the plaintiff brought an action of *assumpsit* against S. and S. as partners, under the firm of *S. & S. & Co.*, and makers of a promissory note, and recovered a judgment against them, which was unsatisfied; and, afterwards, discovering that *P. & V.* were also partners in the firm, at the time the note was given, he brought an action against the four, as makers of the same note: *Held*, that the judgment recovered against two of the defendants, on the note, was a bar to the subsequent suit against the four defendants, for the same cause of action. *Robertson v. Smith,* 459

Vide **COURTS OF JUSTICES OF THE PEACE, 1. JOINT DEBTORS.**

PENALTY.

Vide **DAMAGES.** **AGREEMENT.**

PLEADING.

- I. *Declaration. Variance between declaration and proof.*
- II. *Plea.*
- III. *Replication.*
- IV. *Demurrer.*
- V. *Verdict and judgment.*

VI. *Pleadings in assumpsit.*

VII. *Pleadings in replevin.*

VIII. *Pleadings in trespass.*

I. Declaration. Variance between the declaration and proof.

1. Where there is a count on a special agreement, and a general count for goods sold and delivered, the plaintiff may, if he fails to prove the special agreement, abandon the special count, and resort to the general count. *Robertson v. Lynch,* 451
2. But this cannot be done, if the goods were, in fact, sold under the special agreement, and the plaintiff might, if he had framed the special count properly, have recovered upon it. *ib.*
3. Where the contract stated in the declaration, is on a *past* consideration for the delivery of goods, without mentioning the place of delivery, and, in the alternative, as to the time; and the contract proved was on an *executory* consideration, to deliver goods at a particular time and place mentioned, the variance was held fatal, and the verdict was set aside. *ib.*

II. Plea

4. Where a plea, at its commencement, purports to be an answer to the whole declaration, but answers only a part of it, it is bad. *Hallett v. Holmes,* 26
5. Where the general issue is pleaded, and, also, a special plea, to which there is a replication, and a demurrer, and contingent damages are assessed, at the trial of the general issue, and the demurrer is, afterwards, argued, the court will not allow the party to amend the plea; *aliter*, if the demurrer had been argued before the trial of the issue. *ib.*
6. Where, in an action on a bond conditioned to pay a certain sum of money on a certain day, the defendant pleaded that he gave the

bond to the plaintiff, merely as collateral security for the performance of a contract or agreement between the parties, &c., it is bad; for where the condition of a bond is for the payment of money at a fixed day, no evidence is admissible to vary or contradict it. *Wells v. Baldwin*, 45

7. But if the bond was without a condition, and the plaintiff had executed a separate instrument as a *defeasance*, such defeasance might be pleaded to an action on the bond. *ib.*

8. *Nul tiel corporation* is a good plea in bar, where the plaintiffs sue by a particular name; and the plaintiffs must reply specially, showing how they were made a corporation where the act incorporating them required certain things to be done on their part, before they could become a corporation. *Bank of Auburn v. Aikin*, 137

Vide INSOLVENT DEBTOR.

III. Replication.

9. Where the plaintiff adds the *similiter* to his replication, the defendant may demur without striking out the *similiter*, the demurrer being sufficient notice for that purpose. *Bank of Auburn v. Aikin*, 137

IV. Demurrer.

10. Where there is a demurrer to the whole declaration, containing several counts, one of which is good, the demurrer must fail. *Mumford v. Fitzhugh*, 457
11. Declaration in *case* against five defendants, for turning the water of a river, so as to overflow the plaintiff's land, one of whom was not brought into court: the declaration was held bad, on special demurrer, though it might be good after a verdict. *ib.*

Vide REPLICATION.

V. Verdict and judgment.

12. Where the defendant pleads his discharge under an insolvent act, 468

passed subsequent to the making of the contract on which the suit is brought, and which would, therefore, have been bad on demurrer; and the plaintiff, instead of demurring, replies fraud, and goes to trial on the issue as to the fact of fraud or not, which is found against him; yet, as the plea of such a discharge contains no ground of defence to the action, the court, *non obstante veredicto*, may give judgment for the plaintiff. *Benedict v. Green*, 14

VI. Pleadings in *assumpsit*.

Vide ASSUMPSIT. PLEADINGS.

VII. Pleadings in *replevin*.

Vide REPLEVIN.

VIII. Pleadings in *trespass*.

13. A declaration in *trespass*, by husband and wife, for a personal injury to the wife, containing, also, a cause of action for which the husband alone might sue, as the loss of her company and assistance, in consequence of the battery, &c., is good, after verdict, though it would have been bad on demurrer. *Lewis and Wife v. Babcock*, 443

POOR.

1. An *overseer of the poor*, who contracted with the plaintiff for the support of a pauper, for which he agreed to pay a certain sum per week, was held not to be *personally* responsible on the contract; as, from the facts and circumstances of the case, it did not appear that he intended to bind himself personally. *Olney v. Wickes*, 122
2. An act for a division of a town, directed the supervisors and overseers of the poor of the two towns, to meet and divide the money and the poor belonging to the town so divided, according to the tax list, and that each town thereafter should respectively maintain its own poor; and the supervisors of the poor of the two towns met accord-

ingly, and divided the poor-money between the two towns, and found six paupers in the old town, which they agreed should be maintained by *both towns*, in equal proportion, according to the division of the money; and then the paupers were to be disposed of by the poor masters of both or either of the towns, to the best advantage: in an action of *assumpsit* brought by the overseers of one of the towns against the overseers of the other, on this agreement, for its proportion of the expense of supporting one of the paupers, after the money so divided had been spent: *Held*, that the *overseers, &c.*, in making this agreement, transcended the powers given them by the act, and that, therefore, no action could be maintained upon it, admitting even, that the overseers of the poor may, as such, contract for the maintenance of the poor, so as to bind their successors in office. *Overseers of the Poor of Norwich v. Overseers of New Berlin*, 382

- 3 The *overseers of the poor*, being public agents and trustees of the towns, in respect to the poor, have, without any express authority from the legislature, a capacity to sue, co-extensive with their public trusts and duties; and are corporations *sub modo*. *Overseers of Pittstown v. Overseers of Plattsburgh*, 407
4. When the order for the removal of a pauper from one town to another, on appeal to the Court of General Sessions of the peace, is reversed and quashed, the justices of the peace of the town to which the pauper was so improperly removed, may make an order for his removal back to the town from whence he was removed; or, if it appears that the pauper has no settlement in that town, they may make a new original order for his removal to the place of his last legal settlement. *ib.*
5. The overseers of the poor of the town to which a pauper is so improperly removed, cannot, after the

order of removal is quashed, maintain an action on the case against the overseers of the town from which he was removed, to recover the expenses of his maintenance, he having fallen sick after his removal; the presumption being that the order was obtained *bona fide*: and the statute does not make it the duty of the overseers of the poor, who have caused the pauper to be removed to another town, to take him back at their own charge, *ib.*

6. Whether, if the pauper so improperly removed, has no legal settlement within this state, such an action can be maintained. *Quere. ib.*

Vide OFFICE AND OFFICER.

POSSESSION.

Of Land, *vide* EXECUTION.

POWER.

- K.*, a soldier entitled to military bounty lands, by a deed, dated *January 12, 1788*, granted, bargained and sold, for a valuable consideration, to *B.* all the bounty lands to which he was entitled; and, in the same deed, empowered *A.*, as his attorney, for him, and in his name, to grant, bargain, and convey the same lands to *B.*, his heirs and assigns, in case the same should be necessary upon the grants having passed the great seal of the state for these lands: *Held*, that the power to *A.* was a naked power; and that *K.*, on the 25th *February, 1792*, having, by deed, for a valuable consideration, granted, bargained, and conveyed the same lands to *C.*, his heirs and assigns, for ever; before the execution of the power by *A.*, *C.*, as a *bona fide* purchaser, without notice, became seised of the legal estate in the premises, on the death of *B.*, who took only a *life* estate by the deed from *A.* to him. *Jackson, ex dem. Henderson, v. Davenport*, 295

Vide MILITARY BOUNTY LANDS. TURNPIKES, AND TURNPIKE COMPANIES.

POWER OF ATTORNEY.

Vide DEED.

PRACTICE.

- I. *Process; and Outlawry.*
- II. *Appearance.*
- III. *Oyer.*
- IV. *Change of venue.*
- V. *Removal of cause by habeas corpus.*
- VI. *Commission to examine witnesses.*
- VII. *Reference.*
- VIII. *Notice of trial and countermand.*
- IX. *Discontinuance.*

1. *Process; and Outlawry.*

- 1. An attorney, or any person by him authorized for that purpose, may alter the teste and return day of a writ before it is used or served. *Sullivan v. Alexander,* 3
- 2. As, where the attorney for the plaintiff delivered a *capias ad resp.* to a person, with directions to deliver it to the sheriff, in case A., one of the defendants, (a prisoner in execution, who had been admitted to the liberties of the gaol, on bail,) should be found beyond the limits of the liberties, and to alter the teste and return of the writ, in case it should not be necessary to deliver it before the return day expired; and the agent of the attorney, accordingly, altered the teste and return of the writ, and delivered it to the sheriff, the court refused to set aside the writ. *ib.*
- 3. Proceedings in *outlawry*, in a bailable action, will not be reversed, on *motion* and *affidavit*, because the defendant was not a citizen of this state, but resided in another state or a foreign country; unless the defendant puts in *special bail*, on a writ issued by the plaintiff in a new action; but the defendant will be left to his writ of error. *Roosevelt v. Crommelin,* 263

II. *Appearance.*

- 4. A person *non compos mentis*, not an idiot from nativity, may appear by *attorney*, and the court, on

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motion, will appoint an attorney for him. *Faulkner v. McClure,* 134

III. *Oyer.*

- 5. A defendant who craves *oyer* of a deed, is entitled to a copy of the attestation and names of the witnesses. *Smith v. Alworth,* 445
- 6. A defendant who is entitled to *oyer* cannot be compelled to plead without it. But if he elects to answer, it is a waiver of the objection that the names of the witnesses were not given in the *oyer*, and cannot be a ground of demurrer to the declaration. *ib.*

IV. *Change of venue.*

- 7. When the *venue* in a cause is changed, a copy of the rule for changing the venue ought to be served on the plaintiff's attorney. *Root v. Taylor,* 335

V. *Removal of cause by habeas corpus.*

- 8. Where a cause is removed by *habeas corpus*, from a court of Common Pleas, into this court, the suit here is not to be considered as a continuation of the suit below, unless in certain cases, for the purposes of justice. *Bank of Niagara v. McCracken,* 493
- 9. The plaintiff, therefore, may declare in this court for a new cause of action, and the defendant may set off a demand against the plaintiff, arising since the commencement of the suit below, and before the removal here. *ib.*

VI. *Commission to examine witnesses.*

- 10. Where a rule for a commission to examine witnesses is obtained after the expiration of four days in term, after issue joined in the cause, it does not stay proceedings, unless the court specially direct that it is to have that effect. *Jackson, ex dem. Wadsworth, v. Woodworth,* 135
- 11. But if the commission is obtained within the four days, it will stay the proceedings, of course, though

nothing is said in the rule as to its effect. *ib.*

12. It is, therefore, unnecessary to state in the rule, whether it is to operate as a stay of proceedings, or not; unless by the special direction of the court, on application for that purpose. *ib.*

VII. Reference.

12. Where the parties in *replevin* in a court of C. P. agreed in writing to refer the cause to *B.*, to be determined by him on legal principles; and, thereupon, a rule was entered, that the cause be referred to *B.*, to be heard and determined by him, &c., and *B.* made his report to the court below, on which the court immediately gave judgment: *Held*, that this not being a case referable under the statute, but a mere voluntary submission to the arbitration of *B.*, it was a discontinuance, and the court below having no jurisdiction afterwards, the judgment on the report or award was erroneous. *Camp v. Root*, 22
13. No action lies upon a *report of referees*, made pursuant to a rule of a court of C. P. entered by *consent* of the parties in an action of *assumpsit*, though the case might not have required an examination of long accounts; for it is not an *award*, and the party is concluded by the rule of reference, from alleging that the cause was not referable under the statute, and being *assumpsit* on a *contract*, there might have been long accounts, and the court might give judgment on the report. *Harris v. Bradshaw*, 26
14. If the action had been *tort*, it seems the jurisdiction of the court, to order a *reference*, might have been objected to. *ib.*

VIII. Notice of trial and countermand.

15. If a plaintiff, after giving notice of trial, countermand it, he must pay the *costs* incurred by the defendant, between the time of receiving

the notice and the countermand. *Keys v. Beardsley*, 136

IX. Discontinuance.

16. Where a defendant obtains a discharge under the *act for the relief of debtors, with respect to the imprisonment of their persons*, (1 *N. R. L.* 348.) or under the *act to abolish imprisonment for debt in certain cases*, (sess. 42. c. 101.) the plaintiff may discontinue his suit without *costs*. *Ludlow v. Hackett*, 252
17. But if the plaintiff, knowing of the defendant's discharge, proceeds in the cause, he must, if he afterwards discontinues, pay the *costs* accruing since the discharge. *ib.*

PRE-EMPTION.

Vide LEASE.

PRINCIPAL AND AGENT.

Vide FACTOR.

PRIVILEGE.

1. Attorneys and other officers of the court, since the statute, sess. 36. c. 48. (1 *N. R. L.* 418.) are liable to arrest on *mesne* process, and may be held to bail like other persons. *Secor v. Bell*, 62
2. And they were always liable to be taken in execution on a *ca. sa.* *ib.*
3. If an attorney or counsellor of the court be taken on a *ca. sa.* during his attendance in court, having business to transact there, he may be discharged on motion and affidavit, &c. *ib.*
4. A judge, at a circuit, may also discharge him, under the like circumstances. *ib.*
5. A sheriff cannot take notice of the privilege of an attorney or other officer, nor can he discharge from his custody under process of this court, on his producing a writ of privilege; and if he do so, he is liable, as for an escape, for the amount of the debt and interest, and also for the poundage, if the plaintiff has paid any. *ib.*

PROMISSORY NOTES.

Vide BILLS OF EXCHANGE AND PROMISSORY NOTES.

R.

REFERENCE.

Vide PRACTICE, VII.

RENT.

A landlord, where the goods of his tenant are taken in execution, has a lien only for rent due previous to the levy of the execution; he cannot claim rent which has subsequently accrued while the goods remained on the premises, in the sheriff's possession. *Trappan v. Morie*, 1

Vide LEASE.

REPLEVIN.

1. On a return of *elongata* to the writ of *retorno habendo*, in replevin, it is not necessary to issue a *scire facias* against the pledges; but the defendant, if insufficient pledges are taken, or no pledges at all, may have his action on the case against the sheriff. *Gibbs v. Bull*, 435
2. Where the declaration against the sheriff is under the *eighth* section of the statute, sess. 11. ch. 5. (1 *N. R. L.* 91.) which applies only to distresses for rent, the plaintiff cannot claim *damages* beyond the value of the goods eloigned; for the security required by this section is only for the prosecution of the suit, and for the return of the goods, &c. *ib.*
3. The declaration against the sheriff must allege, that a writ of *retorno habendo* had been issued and *elongata* returned, or it is bad on demurrer. *ib.*
4. It must, also, pursue the words of the statute, and allege that the sheriff made deliverance, &c. without taking security, &c. "to prosecute the suit and to return the same goods, &c. if return thereof shall be adjudged." *ib.*
5. Under the *fourth* section of the statute, he may take such security

as he pleases, in his own name, and at his own peril. *ib.*

6. Though the *fourth* section does not provide that the sheriff shall assign the bond to the plaintiff in replevin, it seems that the court would compel an assignment of it for the benefit of the defendant *ib.*
7. No *venue* is necessary to a plea, nor to a demise in an *avowry* for a distress, &c. in an action of replevin. *Davis v. Tyler*, 490

S.

SALE OF GOODS AND CHATTELS.

1. The plaintiff sold to the defendant a quantity of *Leghorn* hats, of certain qualities, for a certain price, and engaged to deliver extra crowns to match those delivered, free of charge; but the crowns sent did not match the hats before delivered, whereby the defendant sustained a loss: *Held*, that though the defendant had not returned or offered to return the hats, she might, in an action brought against her for the price, nevertheless, insist on a deduction from the sum originally agreed to be paid, in proportion to the diminished value of the goods. *King v. Paddock*, 141
2. Where the vendor is guilty of a fraudulent concealment of material facts, in relation to the sale, to the injury of the vendee, an action at law is maintainable, to recover damages. *Fleming v. Slocum*, 403
3. But the fraud must be proved, and cannot be presumed: Therefore, where in the sale of a slave, without warranty as to his good qualities, &c., there was no other proof of a fraudulent representation, or a fraudulent concealment of facts, but what might be inferred from the fact, that the vendor paid a *sound and full price* for a good and honest slave, but who proved to be bad and dishonest, and the vendor knew at the time that he was so, this was held not to be sufficient evidence to support an action against

the vendor, to recover damages for a fraudulent concealment. *ib.*

SCHOOLS.

Vide COMMON SCHOOLS.

SEAMEN'S WAGES.

1. Where a vessel has been captured and condemned, though the owner recovers the amount of freight from the insurers, the seamen have not, therefore, a right to receive their wages. *Per Spencer, Ch. J. Percival v. Hickey,* 257
2. So, where a neutral vessel was run foul of and sunk by a belligerent cruiser, through *negligence*, the seamen are not entitled to wages, though the owner, in an action of trespass against the commander of the belligerent ship, recovered the full value of the vessel and cargo. *ib.*

SET-OFF.

- One of three joint owners of a vessel effected insurance on the freight, in his own name, for account of the owners, by a *valued* policy, on which there was a total loss, on which notice of abandonment was duly given, but no adjustment made: *Held*, that he might *set off* this loss, in an action brought against him, by the insurers, for *premiums* due to them on other policies of insurance. *Columbian Insurance Company v. Black,* 149

Vide AGREEMENT.

SETTLEMENT OF THE POOR.

Vide POOR.

SHERIFF.

- I. *Duty and authority of sheriff.*
- II. *Liability of sheriff, and attachment against him.*
- III. *Deputy sheriff.*

I. *Duty and authority of sheriff.*

1. A sheriff cannot take notice of the privilege of an attorney, nor can he discharge him from his custody under process out of this court, on his producing his *writ of privilege*:

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And if he does so, he is *liable*, as for an escape, for the amount of the debt, with interest. and also for the poundage, if the plaintiff has paid any. *Secor v. Bell,* 52

2. By the statute, *sess. 36. ch. 67. sec. 5.* on the death of a sheriff, the powers of the under sheriff to act in the name of the sheriff survive, for the benefit of the parties interested in the execution of the process delivered to the sheriff before his decease; and though the under sheriff himself is appointed sheriff, he may proceed under the provision of the statute, as under sheriff. *Ward v. Storey,* 120
3. And where there were several judgments, docketed at different times, on some of which executions were delivered to the old sheriff before his death, and executions on other judgments prior as to the time of docketing, were subsequently issued and delivered to the new sheriff, who took and sold the property of the defendant under all the executions in his hands, the court ordered, that the several plaintiffs should be paid out of the moneys in the sheriff's hands, according to the priority of their several judgments. *ib.*
4. A sheriff is bound, without any demand or request for that purpose, to pay over to the plaintiff, money levied on execution, or he will be liable to an attachment. *Brewster v. Van Ness,* 133
5. It is not sufficient to return that he has the money in his hands, subject to the plaintiff's order. *ib.*

II. *Liability of sheriff, and attachment against him.*

6. According to the true construction of the act concerning sheriffs, *sess. 36. ch. 67. sect. 6. (1 N. R. L. 418.)* if the sheriff neglects to return an execution, the plaintiff, or party aggrieved by such default, in order to entitle himself to have the bond given by the sheriff according to the statute, for the faithful perform-

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ance of the office, put in suit against the sheriff and his sureties, must have previously recovered a judgment against the sheriff in an *action* against him grounded directly on such default. *The People v. Spraker*, 390

7. It is not enough that the plaintiff has proceeded by *attachment* against the sheriff for his default in not returning the execution; and that a judgment has been recovered, in the name of the people, against the sheriff, on his recognizance given to appear on the return of the attachment. *ib.*

8. The statute is to be strictly construed in favor of *sureties*, who are not to be held responsible beyond the terms and scope of their undertaking. *ib.*

Vide ESCAPE. PRIVILEGE. EXECUTION, II. AGENT.

III. Deputy sheriff.

9. A deputy sheriff may sell lands under an execution, and execute a deed to the purchaser as in the name of the sheriff; it is not necessary to show any special authority to the sheriff for that purpose. *Jackson, ex dem. Randall, v. Davis*, 7

Vide I. II.

SHIPS AND VESSELS.

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SURETY.

Vide SHERIFF.

T.

TAXES.

1. A sale of land by the comptroller, for taxes, is of no validity, if the

- taxes were, in fact, paid to the collector; and a deed executed by the comptroller to the purchaser conveys no title. *Jackson, ex dem. Clark, v. Morse*, 441
2. The right or authority to sell lands, under the act, sess. 36. ch. 32. (2 *N. R. L.* 509.) is founded on the non-payment of the tax; and the returns made to the comptroller are not conclusive evidence of that fact; though they may be sufficient to justify him, in the discharge of his duty as a public officer, in making the sale. *ib.*
3. A purchaser of lands, sold at public auction for the non-payment of taxes, acquires only a contingent title, which is liable to be defeated by proof of the fact, that the tax (for which the land was sold) was paid before the sale. *ib.*

TENANTS IN COMMON.

Vide EJECTMENT, V. 18. VI. 20.

TENDER.—*Vide* MORTGAGE, 3.

TENURES.—*Vide* LEASE.

TRESPASS.

- 1 Where an act not *wilful*, but the result of *negligence*, is the *immediate* and *direct* cause of an injury, an action of trespass *vi et armis* will lie. *Percival v. Hickey*, 257
2. Where a belligerent cruiser chases a neutral vessel, supposing her to be an enemy, or for the purpose of search, and in coming up with her, through negligence, runs foul of the neutral, (which had hove to, in the night,) and sinks her, an action of *trespass* lies, at *common law*, at the suit of the neutral, against the commander of the ship of war, for the damages sustained: it being considered a *marine tort* merely, of which a court of common law has concurrent jurisdiction with the *instance* court of admiralty. *ib.*

TRIAL.

In criminal cases.

- 1 A peremptory challenge made by

the prisoner to the *polls*, is no waiver of his right to object the want of a *venire*; for this is not a ground of challenge to the array. *People v. M'Kay*, 212

2. A paper purporting to be a *venire*, but not having the *seal* of the court, is a nullity. *ib.*

Vide NEW TRIAL.

TROVER.

Vide FREIGHT AND CHARTER PARTY.

TURNPIKES AND TURNPIKE COMPANIES.

1. A turnpike act (sess. 25. ch. 113. § 7.) provided, that if any person, with his team, cattle, &c. should, after travelling the road, turn off, in order to pass the toll-gate or gates, on ground adjoining thereto, and again enter on the road, with intention to defraud the company, by avoiding the payment of toll, he should forfeit the sum of five dollars, &c.: the fact that the person, after turning off, travelled on an old public highway, makes no difference; for the only question is, whether he turned off the road, *bona fide*, or with a view to avoid payment of the toll. *Carrier v. Schoharie Turnpike Company*, 54
2. If a person turns off the turnpike, at a place little more than half a mile from the gate, it is a turning off on ground adjacent to the gate, within the meaning of the act. *ib.*
3. A *one horse wagon*, with a spring seat and panneled sides, used only for the carriage of persons, is a "pleasure carriage," within the meaning of the *eleventh* section of the act establishing the *Seneca Turnpike Road Company*, sess. 23. c. 78. (*K. & R. ed. L.* 412 423.) and is liable to pay toll. *Mos. v. Moore*, 128
4. The act incorporating the Columbia Turnpike Company for improving the road from *Hudson* to the *Massachusetts line*, a distance of about twenty miles, authorizes the company to erect the *most eastwardly*

turnpike gate on the road, "at a place near the *Massachusetts line*, as the president and directors should direct:" *Held*, that a toll-gate erected at a place, two miles and three quarters from the *Massachusetts line*, was not placed near that line, within the meaning of the act. *Griffen v. House*, 397

5. Therefore, an action lies against a toll-gatherer, at the suit of a person of whom he demanded and received toll, at such a gate, to recover back the money so unlawfully received. *ib.*
6. *It seems*, that where a power, given to a turnpike company to erect toll-gates, within certain limits, at their discretion, has once been exercised, it is at an end; and the company cannot, without some strong and manifest necessity, change the local situation of the gates which have been once erected, merely to suit their own convenience. *ib.*
7. Though a turnpike company have a lawful right to repair their road, so as to prevent the effects of rains or freshets, yet, in the exercise of this right, they must take care not to injure the owners of the adjoining land. *Boughton v. Carter*, 405
8. They have no right to turn the water which washes the road, on the land of a private person; and if a damage arises to the owner of the adjoining land, for their want of care, or negligence in this respect, he may have an action on the case against them, to recover the damages which he has sustained. *ib.*

V.

VARIANCE.—*Vide* PLEADING, I.

VENIRE.

A paper purporting to be a writ of *venire*, but without the seal of the court, is a nullity. *People v. M Kay*, 212

Vide NEW TRIAL. TRIAL.

VERDICT.—*Vide* NEW TRIAL.

U.

USE.—*Vide* BARGAIN AND SALE.

UTICA BANK.

1. According to the true construction of the act (sess. 38. c. 144.) authorizing the president, directors, and company of the *Bank of Utica*, to establish an office of discount and deposit at *Canandaigua*, in the county of *Ontario*, and requiring all notes issued at such branch at *C.*, to be countersigned by the cashier, and declaring that the same should be considered as payable on demand, at such branch at *C.*, the holder of a note of the *Bank of Utica*, so countersigned and issued, cannot maintain an action upon it against the *Bank of Utica*, without having previously demanded payment of it at the branch at *C.*—A demand of payment at the *Utica Bank* only, is not sufficient. *Bank of Utica v. Magher*, 341
2. A note of the *Utica Bank*, on which is written, "countersigned, *O. Seymour*," is countersigned within the meaning of the act; for it is not necessary, to give the note validity, that he should add to his name, his official character of cashier at *C.* *ib.*
3. And the act in question, being to extend the powers of the *Bank of Utica*, under its act of incorporation, which was a public act, is also a public act of which every person is bound to take notice. *ib.*
4. The presumption in such a case is, that the countersigning is official; and if there be any ambiguity on the face of the note, it may be explained by *parol*. *ib.*

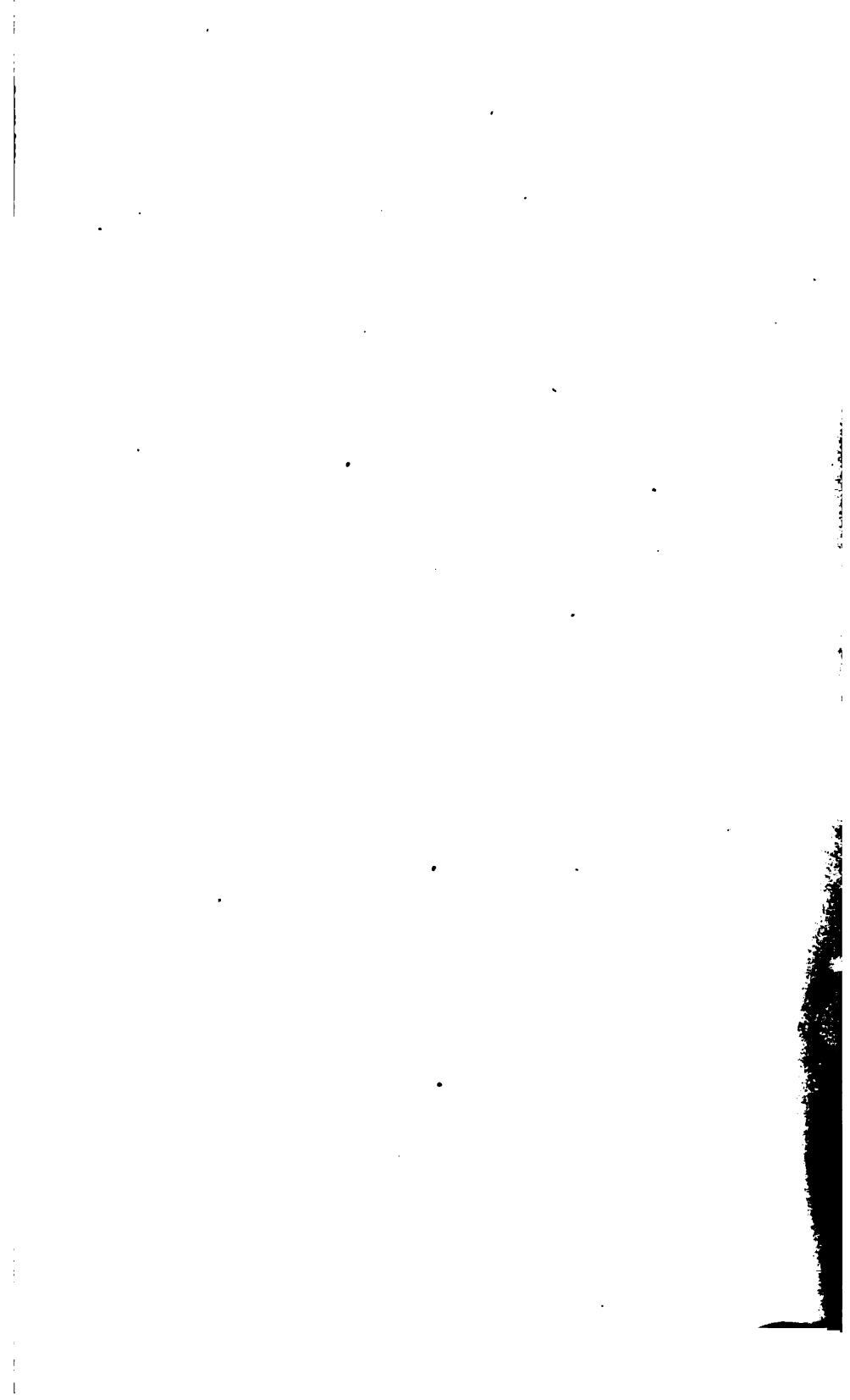
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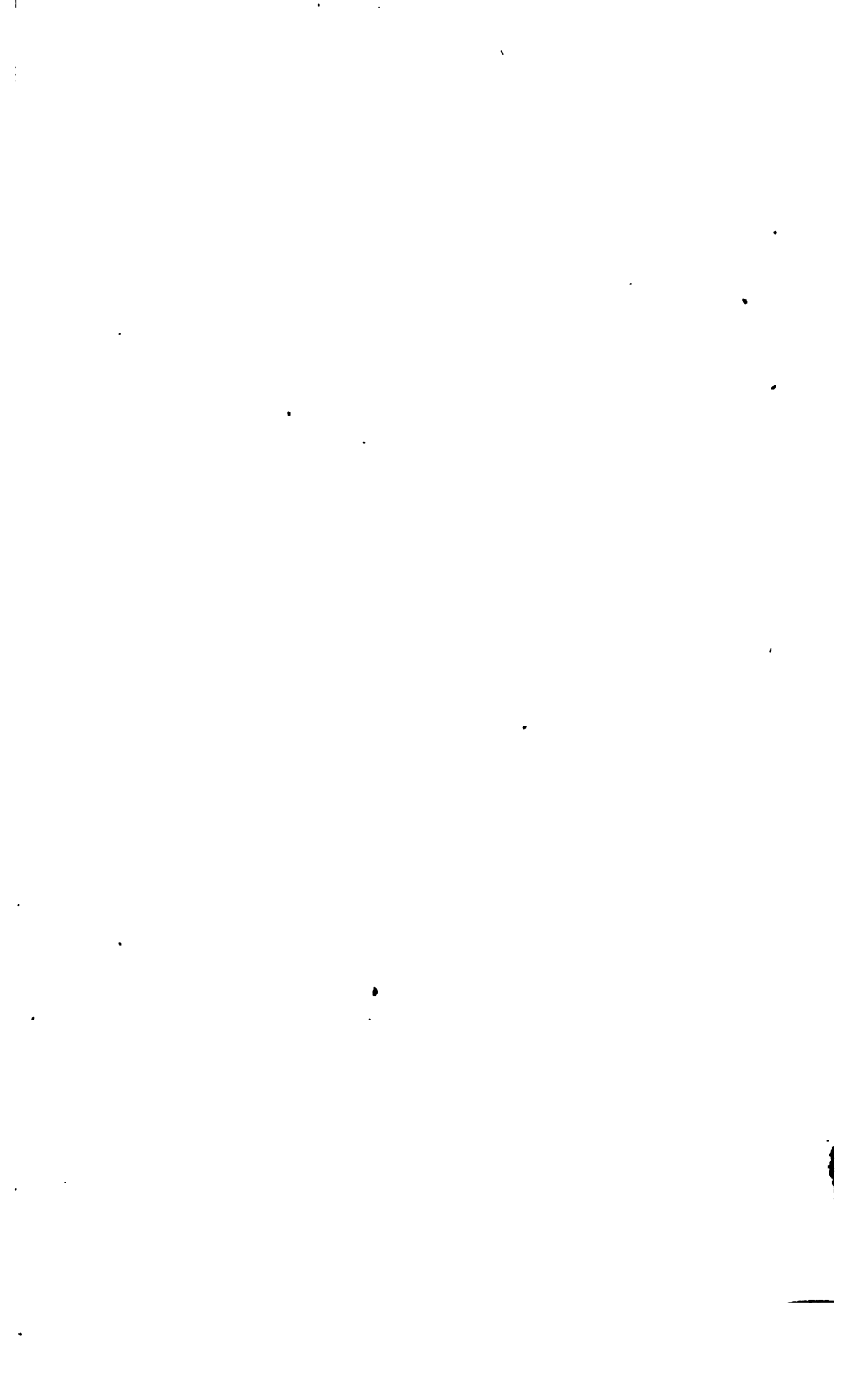
Vide LANDLORD AND TENANT.

WITNESS.

Vide EVIDENCE, X.









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